Supreme Court, U.S.
FILED
SEP 19 1985
JOSEPH F. SPANIOL, JR.
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85-472

No.

IN THE

Supreme Court of the United States

October Term, 1985

DAVID BULLOCH, et al., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standards for determining "fraud upon the court" within the meaning of Fed. R. Civ. P. 60 (b), when counsel for and other ranking officers of the prevailing party knowingly participated in the fraudulent scheme.

2. Whether the court of appeals properly applied Fed. R. Civ. P. 52 to the findings of the district court that ranking officials and attorneys of the United States had committed a fraud on the court warranting a new trial.

PARTIES TO THE PROCEEDING

In addition to David Bulloch, the petitioners are McRae N. Bulloch; Kern Bulloch; Douglas Corry; A. C. Seegmiller; Myron Higbee; Nelson Webster; Lillian W. Clark (for herself and as representative of the estate of Douglas C. Clark, deceased); Lambeth Brothers Livestock, a partnership; T. Randall Adams; Dee Evans and John Does I through XX.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The *en banc* decision of the Court of Appeals is reported at 763 F.2d 1115 and is reprinted in the Appendix. (App., *infra,* 1a-25a) The panel decision (App., *infra,* 27a-39a) is reported at 721 F.2d 713. The district court's opinion (App., *infra,* 40a-91a) granting petitioners' Rule 60(b) motion is reported at 95 F.R.D. 123. The district court's initial opinion (App., *infra,* 92a-98a) entering judgment for the United States in petitioners' Federal Tort Claims Act suit is reported at 145 F. Supp. 824.

JURISDICTIONAL STATEMENT

The judgment of the *en banc* court of appeals was entered on May 22, 1985. On August 12, 1985, Justice White extended the time to file this petition to and including September 19, 1985 (No. A 177). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . . or to set aside a judgment for fraud upon the court. . . . [T]he procedure for obtaining any relief from a judgment shall be by motion as prescribed by these rules or by an independent action.

Rule 52 of the Federal Rules of Civil Procedure provides, in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury . . . findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT

1. In 1953, thousands of sheep and lambs died after the sheep, primarily pregnant ewes, were exposed to radioactive fallout from nuclear tests conducted by the United States at the Nevada Proving Grounds. (App., *infra*, 55a) Petitioners, Utah sheep owners who had suffered unprecedented losses of sheep and newborn lambs after the nuclear tests, filed suit in 1955 in the United States District Court for the District of Utah against the United States under the Federal Tort Claims Act, 28 U.S.C. §§1346,

2671 *et seq.*, alleging that the government had acted negligently in failing to warn petitioners of the planned detonations and the risks of fallout to livestock. The case was tried in 1956 before the district court (A. Sherman Christensen, J.) without a jury.

The district court found that the government breached a duty owed to petitioners by failing to give them any warnings before the nuclear tests even though "[d]amage . . . could well have been anticipated by those in charge of the tests. . . ." (App., *infra*, 95a-96a) Accordingly, the outcome of the "case turned upon whether damage did occur to [petitioners'] sheep as a result of atomic testing." (App., *infra*, 45a) Although the court found petitioners' evidence "persuasive at first blush," particularly in light of the time sequence between the tests and the death of so many sheep and lambs, the court ultimately concluded that it could not make a finding of causation, in part, because no one who "claimed" to be qualified in the field of radiation testified that the injuries to the animals were caused by radiation. (*Id.* at 45a n.2) Accordingly, the court entered judgment for the United States.

In 1979, the House Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, the Health and Scientific Research Subcommittee of the Labor and Human Resources Committee and the Senate Committee on the Judiciary heard testimony regarding the conduct and effect of nuclear tests in Nevada during the 1950s. The subcommittee located and released many documents never before available to the public and made findings indicating a concerted government effort to suppress evidence demonstrating causation between the

nuclear tests and the extraordinary number of deaths of sheep and lambs in Utah in the spring of 1953.[1] (The hearings are collected at R.XXXII, Serial Numbers 96-41, 96-42, 96-129; *see* 96-41 at 100)

2. In 1981, after further investigation based on the 1979 Congressional findings and documents first made available by the hearings, petitioners filed the instant actions in the United States District Court for the District of Utah, seeking to set aside the various 1956 judgments "for fraud upon the court" within the meaning of Fed. R. Civ. P. 60 (b).[2] Remarkably, the same judge (Christensen, J.) who had tried the 1956 case was still available to hear petitioners' Rule 60 (b) motion.

After a bench trial, the district court granted petitioners' 60 (b) motion and awarded them a new trial. With respect to the issue of fraud, the court found (App., *infra*, 83a-84a):

> [I]t appears clearly and convincingly from all of the circumstances of the litigation as they now appear, and I find, that one or more of defendants' attorneys knowingly participated in a program for the concealment from the Court of facts which he or they knew or in good conscience should have

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[1] The court of appeals discounted these findings as the product of a one-sided presentation, App., *infra*, 9a, but the fact remains that an impartial group, after reviewing the available evidence, reached the conclusion that a concerted effort to conceal facts may have been made in 1955. A government scientist concluded that on the basis of facts known to the government in 1956, no one could conclude that radiation had not contributed to the sheep and lamb deaths. (R. XXXII 96-41 at 99, 100) Obviously, such findings by an official body would cause a reasonable person to reconsider whether the first trial was conducted fairly.

[2] Petitioners filed both an independent suit in equity and a Rule 60 (b) motion. The district court consolidated all of the actions. For simplicity, petitioners will refer to the consolidated actions as a "Rule 60 (b) motion."

> known the Court was entitled to have placed before it in order properly to rule upon the determinative issues of that case.

This fundamental condemnation of the conduct of government attorneys in respect to the 1956 trial was supported by a number of subsidiary findings. Of particular significance, the court concluded that scientists who believed that the Nevada tests caused the deaths of the sheep had been subjected to improper efforts by government officers, with the knowledge and aid of government attorneys, to change or "neutralize" those experts' opinions. For example, Dr. Robert Veenstra, who was a member of the Army Veterinary Corps sent by the Atomic Energy Commission ("AEC") to investigate the Utah sheep deaths, was a witness for petitioners. He had concluded in June 1953, "that radiation was at least a contributing factor to the loss of these animals." (App., *infra*, 65a) In March 1955, Colonel Bernard Trum, another member of the Army Veterinary Corps, wrote Veenstra, in anticipation of petitioners' trial, that "I shouldn't like to go into this thing divided within our own Corps if we can avoid it." Trum then met with Veenstra on April 1, 1955. (App., *infra*, at 67a)

On April 7, 1955, Veenstra wrote a letter to Trum which was not revealed to petitioners until they brought their Rule 60 (b) motion, in which Veenstra stated that his "position has not been materially changed; basically we are still of the opinion that radiation could have contributed to the deaths of the animals." (*Id.*) The letter was taken from Veenstra by one of the government's attorneys and bears the following message in a different type:

> (THIS LETTER WAS NOT SENT – HAS NOT BEEN PUBLISHED AND IS CONFIDENTIAL TO THE DEPARTMENT.)

On the same day Veenstra wrote the letter about his opinion on causation, he also "wrote a hand-written letter abdicating his long-time and forcefully defended position that radiation was a contributing cause."[3] (App., *infra,* 70a)

The district court found these events to be "strange and tortuous" and stated that they indicated "unacceptable pressure placed by the Government upon witnesses adverse to its position." (App. *infra,* 70a) The court rejected the government's assertion that Veenstra's neutralization was merely the product of discussion among scientific colleagues, but found it clearly involved "deceitful conduct" concurred in and abetted by government attorneys and sufficient to undermine the "processes of the court as an institution."[4]

The district court found that this concealed pressure on adverse witnesses had a material effect on the outcome of the first trial which was reinforced by the government's sworn but "evasive" and "untrue" (App., *infra,* 76a) responses to petitioners' interrogatories. Petitioners inquired

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[3] Veenstra's second, hand-written letter said: "If called upon for a statement I will just report what we found and say we felt it a possibility that should be pointed out for consideration." (R. IV P-17 Tab 15)

Confident that Veenstra would not divide the Army Veterinary Corps, Trum wrote assistant United States Attorney Llewellyn Thomas on May 12, 1955 that Veenstra would testify that he had no evidence that radiation caused or contributed to the deaths. (R. IV P-17 Tab 18; App., *infra,* 71a)

[4] The district court also found that undue pressure had been applied on Dr. Robert Thompsett to change his opinion that radiation had contributed to the deaths. Trum sent him a model letter in which Thompsett falsely renounced his views. In 1982 Trum testified that he had attempted to eliminate all adverse testimony at the 1956 trial, in part to "save trouble at trial to have [the court] go into those things." (App., *infra,* 75a) Trum also admitted thatt neither Veenstra nor Thompsett had changed his mind. (R. XVI at 72)

whether anyone involved in the AEC investigation disagreed with the AEC's final report that radioactivity did not contribute to the death of the sheep. (App., *infra*, 51a) The government's attorneys responded prior to trial that they did not know of anyone "who *now* disagrees with the report issued by the AEC." (*Ibid.*, emphasis added) The deception and falsity in this answer arise from the fact that at least two investigators disagreed with the report's conclusion. (*Id.* at 76a) The response clearly indicated that all scientists who had previously concluded that there was a causal nexus between the negligently conducted tests and the death of the sheep and lambs had *now* changed their minds. As the distirct court correctly noted, in reasonable reliance upon this statement, petitioners naturally avoided inquiring into the change of opinion by these experts for fear that their *testimony on that point would directly impeach the earlier opinions those experts held that radiation did cause the deaths of the sheep.*[5] (App., *infra*, 69a)

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[5] The district court also found that the government deliberately concealed the specific findings of over four years of government experiments by Dr. Leo Bustad on the effects of radioactive iodine on sheep and lambs. (App., *infra*, 64a) Those findings supported petitioners' claim that their animals' deaths had been caused by the nuclear tests. The AEC's final report on the Utah sheep problem appended and was based on Bustad's report of his experiments in which he asserted that the "Utah sheep showed no evidence of the radiation damage observed in experimentally treated sheep." (*Id.* at 60a) Bustad's summary omitted and concealed his specific findings that showed striking similarities between petitioners' sheep and lambs and the experimental animals. (App., *infra*, 62a, *see* R. XI 104, 158; R. XXXII, 96-42 at 1731 *et seq.*)

The court of appeals dismissed the incident because petitioners could have requested the actual studies — even though the conclusion in the disclosed summary would have given them little reason to want to do that. But, in any event, the court of appeals ignored the real importance of this finding, *viz.*, that the government had, in several ways, misled the public, the petitioners and the court concerning the effects of the nuclear tests.

The combined effect of the pressure on witnesses and the responses to petitioners' interrogatories was to weaken materially petitioners' proof on the critical, and very close, factual issue of causation. As the district court explained, it "was troubled [in 1956] by some circumstantial evidence suggesting a contrary conclusion and particularly unsatisfactory proof of any reasonable alternative to radiation damage." (App., *infra,* 46a) If the government had not tampered with the testimony of experts, the outcome of the case might have been different, since evidence "of substantial significance and weight in favor of [petitioners'] claims" was wrongfully withheld. (App., *infra,* 64a) The district court concluded that, in light of all the circumstances, a new trial was warranted.

3. A panel of the court of appeals reversed. (App., *infra,* 27a-39a) The court then voted to rehear the case *en banc,* but again reversed by a vote of 5-2. (App., *infra,* 1a-13a) The majority of the *en banc* court simply adopted the panel opinion without modification.

In reversing, the court of appeals imposed a heavy burden on petitioners. First, it criticized petitioners for not pursuing the issue of the government's conduct with greater diligence. Although the court of appeals concluded that laches did not bar a claim of fraud on the court, the majority nevertheless reasoned that the delay "bear[s] on the basic concept of the finality of the judgments and the proof." (App., *infra,* 12a)

With respect to the legal standards governing fraud on the court, the majority reasoned that reliance by the government and its attorneys on "fraudulent documents, false statements or perjury" did *not* constitute "fraud on the court" within the meaning of Rule 60 (b). Rather, fraud on the court required proof that "the court or a member is

corrupted . . . or where the judge has not performed his judicial function — thus where the impartial functions of the court have been directly corrupted." (App., *infra,* 12a) The court of appeals then reviewed the district court's findings with respect to the veterinarian witnesses and concluded "that nothing was demonstrated which would constitute fraud on the court." (*Id.* at 13a)

Judge McKay dissented. He argued that the court had imposed an unduly strict burden on petitioners to demonstrate fraud on the court and that the court improperly focused on petitioners' alleged "lack of diligence" instead of the government's conduct. In addition, Judge McKay argued that the court had exceeded the proper bounds of appellate review under Fed. R. Civ. P. 52 in holding that the district court erred in finding that the government had acted fraudulently in its conduct surrounding the 1956 trial. (App., *infra,* 14a-25a)

REASONS FOR GRANTING THE PETITION

The court of appeals has adopted what Judge McKay correctly described as a "curiously narrow construction of what constitutes fraud on the court," which conflicts with the clear holding of this Court in *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U.S. 238 (1944), and is also inconsistent with the interpretation of Fed. R. Civ. P. 60(b) followed in other circuits. Moreover, it was only by adopting its erroneous interpretation of fraud on the court that the Tenth Circuit could set aside the findings of the district court that the United States government, with the full knowledge and

participation of its attorneys, acted to conceal evidence that was of crucial importance to petitioners' case. The court of appeals' cavalier review of the district court's findings and analysis regarding the conduct of the government in defending against petitioners' case warrants review by this court.

1. The court of appeals held that fraud on the court under Rule 60 (b) is demonstrated only when the moving party can show clearly that conduct by one of the parties "corrupted" the court. (App., *infra,* 12a) The court's interpretation is plainly wrong. In *Hazel-Atlas Glass Co.* v. *Hartford Co., supra,* the Hartford-Empire Co. had attempted unsuccessfully to patent a method of pouring glass into molds. In order to convince the patent office of the invention's worth, Hartford-Empire, with the aid of its attorneys, arranged to have an article praising the invention published in a trade journal that would be signed by a neutral "expert." The article was used in the Patent Office to obtain the patent and later relied upon successfully by Hartford-Empire's attorney in its appeal of an adverse ruling on infringement of its patent. In reviewing the court of appeals' refusal to set aside the judgment, this Court held that there was "such fraud on that Court as demands, under settled principles, the interposition of equity to devitalize" the 12-year-old judgment. 322 U.S. at 245.

Based on the facts in *Hazel-Atlas,* courts of appeals, prior to the decision in this case, have consistently recognized that efforts to deceive the courts, when concurred in or instigated by attorneys for one of the parties, justify a new trial under Rule 60 (b) so long as the deception is material to the outcome of the case. *H. K. Porter Co.* v. *Goodyear Tire & Rubber Co.,* 536 F.2d 1115 (6th Cir. 1975); *Kupferman v. Consolidated Research & Mfg. Co.,* 459 F.2d 1072 (2d Cir. 1972). It is not necessary, as the Tenth Circuit

required, for the moving party to show that the deception "corrupted" the court. This is because "attorneys are officers of the court" and therefore, "their conduct, if dishonest, would constitute fraud on the court." *H. K. Porter Co.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d at 1119; *Kupferman* v. *Consolidated Research & Mfg. Co.*, 459 F.2d at 1078.[6] *See also*, 7 Moore, Federal Practice ¶60.33 at 513 (1971 ed.) (and cases collected); *Southerland* v. *Irons*, 628 F.2d 978 (6th Cir. 1980) (attorney committed fraud on the court when he failed to make payment as promised in a stipulation); *Synanon Church* v. *United States*, 579 F. Supp. 967, 972 (D.D.C. 1984) (fraud on the court found when counsel concurred in deliberate, systematic destruction of plantiff's discoverable records). The Tenth Circuit's restrictive interpretation of fraud on the court thus conflicts with the decisions and reasoning of both this Court and other courts of appeals.

In addition, the Tenth Circuit committed further error by relying upon petitioners' alleged "lack of diligence" as a basis for overturning the district court's Rule 60 (b) relief. The court of appeals' reasoning is also inconsistent with *Hazel-Atlas*. First, the district court found that petitioners had acted reasonably, and the court of appeals nowhere holds that that finding is clearly erroneous. (App., *infra*, 11-a-13a) As Judge McKay pointed out in dissent, in the years after the decision, "the government's virtual monopoly on information regarding the effects of radiation ended," and petitioners obtained new information relevant to this case. (App., *infra*, 16a)

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[6] Others commit fraud when they "... interfere with the judicial machinery performing the task of impartial adjudication . . . by preventing the opposing counsel from fairly presenting . . . [his] case or defense." *Pfizer, Inc.* v. *International Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977).

More important, the majority's comments about petitioners' diligence assume that the only interest at stake is righting the wrong done to the party to the litigation. The majority's analysis utterly ignores the *district court's* independent interest in denying the wrongdoer the benefits of an improperly obtained judgment which undermines public respect for the court's processes. As this Court made plain in *Hazel-Atlas,* the court's interest, which is particularly significant when officers of the court act to deceive it, should not be contingent upon litigants for vindication. The Court there dismissed Hartford-Empire's claim that Hazel-Atlas had failed to exercise due diligence in uncovering the fraud even though its attorney had heard rumors about the situation at the time of the original trial 12 years before. As the Court explained (322 U.S. at 246):

> Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.[7]

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[7] The fundamental premise of the court of appeals' analysis was that all the information that petitioners relied upon in their Rule 60 (b) motion was available to them in 1955. This premise entirely ignores the district court's judgment that the concealed pressure on the expert witnesses, coupled with the government's deceitful response to the interrogatories, made it tactically unwise for petitioners to inquire into the change of opinion. Only if petitioners assumed or had evidence of bad faith by the Justice Department would they have initiated an investigation through discovery or at trial of the reason for the change of opinion. Indeed, it is far from clear that the witnesses would have admitted at trial or otherwise that they were pressured into modifying their opinions. Moreover, government witnesses in 1982 admitted and documents demonstrated that documents and evidence had been withheld. (*See e.g.,* App., *infra,* 60a, 62a-63a) In any event denying petitioners' motion because of lack of diligence and thereby condoning deception by the government's attorneys is inconsistent with the policy of protecting the judicial process that underlies the fraud on the court doctrine.

The Tenth Circuit's legal reasoning with respect to Rule 60 (b) directly conflicts with this Court's decision in *Hazel-Atlas*. Accordingly, review of the decision below by this Court is necessary to ensure that Fed. R. Civ. P. 60 (b) is interpreted properly.

2. In petitioners' view, the decision below was tainted by the court of appeals' reliance upon an improper legal standard under Rule 60 (b). Nevertheless, the majority opinion indicates, in a conclusory manner, that the district court's findings lack an adequate basis in the record. Although petitioners ordinarily would not present an issue to this Court concerning the proper application of Rule 52, such an issue is necessary in this case to avoid the response of the United States that the Rule 60 (b) issue is not dispositive because the district court's findings of fraud lacked an evidentiary basis. For the reasons explained above and in Judge McKay's dissent, (App., *infra*, 14a-25a), that unsupported conclusion is wrong.[8] As the previous discussion demonstrates, there was ample evidence to support a finding

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[8] The district court held that (App., *infra*, 88a):

> In such a setting it appears by clear and convincing evidence, much of it documented, that representations made as the result of the conduct of government agents acting in the course of their employment were intentionally false or deceptive; that improper but successful attempts to pressure witnesses not to testify as to their real opinions, or to unduly discount their qualifications and opinions were applied; that a vital report was intentionally withheld and information in another report was presented in such a manner as to be deceitful, misleading, or only half true; that interrogatories were deceptively answered; that there was deliberate concealment of significant facts with reference to the possible effects of radiation upon the plaintiffs' sheep; and that by these convoluted actions and in related ways the processes of the court were manipulated to the improper and unacceptable advantage of the defendant at trial.

that the government acted improperly in dealing with witnesses and insulated itself from a searching inquiry by petitioners at trial by the way it responded to their interrogatories. The majority does not satisfactorily respond to this argument; it merely reasons that the witnesses were available to petitioners. That is beside the point. The finding of the district court was that the government's misconduct undercut petitioners' ability to examine the witnesses fairly on an issue crucial to the proper disposition of this case.

Accordingly, the majority's analysis is wholly inconsistent with this Court's most recent interpretation of Rule 52 in *Anderson* v. *City of Bessemer,* 105 S.Ct. 1504 (1985), because the court of appeals simply disregarded the findings of the district court. The opinion below manifestly ignored this Court's injunction in *Anderson* that "[i]f the district court's account of the evidence *is plausible* in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." (105 S.Ct. at 1511-12 (emphasis added)). This unjustified intrusion into the fact-finding function of the district court, which evaluated the credibility of the government's witnesses on two occasions, warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Tenth Circuit in this case should be granted.

Respectfully submitted,

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September 18, 1985

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 82-2245, 82-2352

DC Nos. C-81-0123C, C-19-55, C-22-55, C-23-55, C-26-55, C-27-55, C-42-55

DAVID BULLOCH, McRAE BULLOCH, KERN BULLOCH, DOUGLAS CORRY, A. C. SEEGMILLER, MYRON HIGBEE, NELSON WEBSTER, LILLIAN W. CLARK, for herself and as personal representative of the estate of Douglas C. Clark, Deceased, LAMBETH BROTHERS LIVESTOCK, a partnership, T. RANDALL ADAMS, DEE EVANS and JOHN DOES I through XX,

PLAINTIFFS-APPELLEES,

v.

UNITED STATES OF AMERICA,

DEFENDANT-APPELLANT.

Appeal from the United States District Court
For the District of Utah
A. Sherman Christensen, District Judge, Presiding

Decided May 22, 1985

OPINION

Before: HOLLOWAY, Chief Judge, and SETH, McWILLIAMS, BARRETT, McKAY, LOGAN and SEYMOUR, Circuit Judges.

SETH, Circuit Judge:

This is an appeal from a judgment by the trial court which granted relief to the plaintiffs in an independent action to set aside, on the ground of fraud, a judgment against them entered by the same court in 1956. Relief was also sought under Rule 60 (b). The original action was a Tort Claims Act suit for the loss of sheep asserted to have been caused by radiation from atomic tests at the Las Vegas Test Site in 1953.

In the original case the findings and conclusions were that the sheep had not died as a consequence of the atomic tests but had died from other causes.

The original Tort Claims Act suit is referred to by the parties as Bulloch I. A very small portion of the testimony was transcribed and the notes have been lost. Only a few of the exhibits are available. There are some depositions and briefs which have survived. The trial judge in his oral and written findings and conclusions summarized the testimony. The opinion appears at 145 F.Supp. 824.

The plaintiffs in the appeal before us assert that there was information withheld from them in the original suit, that witnesses for the Government were pressured, and there was fraud on the court. The plaintiffs also filed a motion to set aside the original judgment. The trial court entered judgment in the separate action and ordered that the judgment of 1956 be set aside by reason of fraud on the court. The court also awarded attorney fees to the plaintiffs. The Government has taken this appeal.

The record in Bulloch I which has survived is very limited. As mentioned, a very small part of the testimony as transcribed is available. From the depositions, briefs and memoranda and with the trial court's summary, the trial as to the specific points relied on by the trial court in Bulloch II can be reconstructed with some confidence. Most of the witnesses from Bulloch I testified again.

The trial court in its conclusions and findings in Bulloch II makes several general statements as to fraud and withholding of information in Bulloch I. The trial court makes reference to four specific events at trial of Bulloch I or items of proof. Presumably the general observations or statements as to fraud are drawn from these particulars.

The four particular items mentioned by the trial court are:

(1) The Bustad Report — a comparison of radiation tests on sheep at Hanford with the data on the Utah sheep. The Hanford experiments had been made several years before the Utah suit. The trial court concluded that the comparison omitted essential facts.

(2) That the Government had given misleading information as to measures of radiation at certain places — radiation dosages.

(3) That witnesses, especially the veterinarians, had been "pressured" to testify in a certain way.

(4) That the Government had given misleading answers to interrogatories.

Estimates of radiation dosages were, of course, a significant part of the Bulloch I trial. The amount of radiation to which plaintiffs' sheep had been exposed was a factual issue at the first trial. Plaintiffs' Trial Memorandum in Bulloch I details the radiation dosages which were the subject of their claim, and an exhibit was presented by plaintiffs to demonstrate the point. The plaintiffs had available and used the same basic data used by the Government to make its estimates. The Plaintiffs also presented at the original trial additional radiation maps apparently derived from their own sources. The record thus shows that all the information the Government had as to dosages was available to plaintiffs, and that they also had other data.

The data and maps presented the material in a detailed manner. It is apparent that during the investigation by the Government preceding the trial the dosages were revised as it progressed. These revisions were always upward and were, according to the testimony, to give maximum levels and thus to be above "probable average values." The plaintiffs were aware of these revisions and the reasons long before the trial. Since all data was available the parties could trace its development during the investigations. There was also available the reports, with the opinions of the experts, which will be mentioned later but which show a change of opinion as the investigations progressed and as experiments were conducted. All of this was before Bulloch I, and revealed in detail to plaintiffs. There was no evidence presented at Bulloch II that the maps or data were incorrect.

The plaintiffs assert that the Government knew at the time of the first trial that there were unexplained small areas of higher radiation within generally lower areas. These were referred to in the second trial as "hot spots." The plaintiffs assert that this phenomenon was not revealed at the first trial, and it was not. The plaintiffs state that this condition was discovered with the detonation of the Boltzman shot, and the record so reflects, but this event was not until 1957, and hence after the first trial, so nothing was withheld as to this condition at Bulloch I as no one knew of its existence.

All the witnesses who testified in Bulloch I who were supposed to have participated in the suppression of evidence testified in Bulloch II. They also there testified specifically that there had been no suppression whatever of evidence at Bulloch I. They likewise testified that there had been no attempt to pressure them as to their opinions or as to their testimony.

It may be repetitious, but the most significant aspect of the records in Bulloch I and II is that all the information, data and witnesses were available to plaintiffs at Bulloch I. The plaintiffs chose to use some of the data and not other parts; they likewise selected among the witnesses who were made available for depositions and for trial; also they limited the extent of their consideration of the reports and studies which were provided to them. Plaintiffs in Bulloch I thus tried the case the way they wanted. They made decisions on what to put on as trial strategy and limited their review of data reported. It appears that they would not try the case the same way should they have another chance although the material is the same.

As mentioned, the record shows that at Bulloch I the Government provided all data plaintiffs asked for. They were given the AEC file data on the investigation of the sheep deaths. The Government made an offer to make available the individuals who had participated in the study, and any others. Other reports of experiments were provided and the experts were available for depositions. The Government did have all the technical data in 1953 and 1954, and conducted the experiments and investigations, but again this was made available to plaintiffs. This is all the data that is now available.

The plaintiffs had knowledge of the series of reports made by the Government veterinarians during the course of the investigations. They were aware that the conclusions of each were not the same, and were aware that positions changed as the pretrial investigation progressed. We find nothing whatever that could have misled plaintiffs as they could trace the progress of the investigation from the reports which were provided to them. Again, they had the data the Government had. If they did not choose to use it that was a decision they made. The reports of the investiga-

tion were quoted at length in plaintiffs' Bulloch I trial memorandum, and the depositions show they had the documents and the information. Dr. Holmes, one of the persons participating in the investigation, was called as a witness by plaintiffs, and they had several pre-Bulloch I trial conversations with him. Dr. Holmes had died before Bulloch II. The plaintiffs assert that the Government presented an untrue representation as to the views of Dr. Holmes at Bulloch I, but again, he testified for plaintiffs and they had a full opportunity to interview him. The plaintiffs assert that the correct version of his views was revealed by certain documents they now refer to; however, these documents were available to them at the first trial.

The record shows that the trial court in Bulloch I considered the views of the veterinarians Veenstra, Holmes and Thompsett, and their development during the investigation. There appears to be nothing unusual about this.

The AEC facilities at Hanford, Washington had done some experiments from 1949 to 1953 (before Bulloch I) to study radiation damage to sheep and lambs. The sheep were fed radioactive material in this experiment. The Government asked the officials at Hanford to compare the data they had obtained with the data on the Utah sheep. The comparison was made, and the report was known as [sic] Bulloch I as the Bustad Comparative Study. This report concluded that the "Utah sheep showed no evidence of the radiation damage observed in experimentally treated sheep."

The experts testified that if the Hanford ewes ingested radioactive material they would develop a hypothyroid condition, and the lambs would be weak and die not long after birth. The Utah ewes, however, had not developed any abnormalities of the thyroid, and thus the experts found no significant similarity between the two groups and con-

cluded the Utah sheep and lambs had not died from radioactive exposure. The trial court did not follow the testimony of the experts in the second trial and relied only on the fact that the lambs were weak and died young in both groups to establish a similarity. The trial court thus concluded that the Bustad report did not reveal all it should have by not comparing the early death of lambs as the important factor and thus something was withheld. The experts relied on the thyroid comparison as the significant factor.

All the Hanford data was published and was available to the public in 1953. This comparison listed the previous reports and it referred the readers to the listed reports for the "details of the experiments." The Report recited that it only purported to be a summary of the experiments and conclusions. The basic data was cited. The plaintiffs thus had available all the pertinent data on the experiments with clear references-citations to the details. The damages caused by radiation at the Hanford experiments were there clearly identifiable, as mentioned, but there was no such damage in the Utah sheep.

We find nothing to demonstrate that misleading answers were made by the Government in Bulloch I. The plaintiffs were familiar with all the background data as hereinabove described. With this familiarity they chose not to seek additional answers or clarifications.

The Comparative Study referred to above became a central issue in Bulloch II in the trial court's finding of failure to disclose by the Government, but there is no basis in the record to suggest that anything was withheld.

The several specific items referred to by the trial court in its findings in the case before us have been considered in the foregoing description. As mentioned at the outset, these are the only particular matters referred to and the

balance of the trial court's findings and conclusions are in general terms, and could only be based on these factors.

The trial court thus (1) mentioned the Bustad report and asserted that information had been withheld; (2) it mentioned that the Government had given misleading information as to radiation dosages; (3) that the veterinarians had been pressured by the Government; and (4) that misleading answers had been given to interrogatories by the Government. Each of these specifics have been considered in relation to the record in the proceedings appealed from and to what original record and briefs are extant. We must conclude that none of these several findings or conclusions are supported by the record. The information, data, reports, maps, experiments and witnesses were all available to plaintiffs at the first trial. The data is the same now. They tried their case on the basis of their then best judgment in the selection of witnesses, interviews, the evaluation of data and reports, and the consideration of the position of the experts.

The trial court in its Memorandum shows that it would draw different conclusions and inferences from the testimony, and from the developing opinions of the veterinarians.

We have not mentioned the Los Alamos Scientific Laboratory comparative study of radiation burns (in experiments) and the lesions on the Utah sheep. The analysis of tissues, organs, bones and blood samples made by Doctors Comar, Rust and Trum showed no evidence of radiation injury to the sheep in the flocks of plaintiffs where the losses took place. A tissue analysis was made on the sheep by the Utah University College of Medicine and the conclusion was reached that the sheep had been exposed to radiation but the examination concluded that there had been no acute effects from the exposure. The Hanford comparative

study, as mentioned, concluded that the sheep had not died from exposure to radiation.

In Bulloch I the conclusion of the experts was that the sheep and lambs had died as a result of unprecedented cold weather during the lambing and shearing, together with malnutrition, also to generally poor range conditions and to common diseases which caused the skin lesions and deaths. These conditions were established by the evidence. The losses began after an initial detonation but before the detonation of the "Harry" test. The expert witnesses who were the leading authorities on the subject thus concluded that the losses were not due to radiation. There was no evidence presented that humans in the areas with the sheep nor animals such as the sheep dogs or horses, which were with the sheep, were affected.

It is apparent that in Bulloch II the assertions of fraud against the Government, the witnesses, the Government employees, the experts and the attorneys for the Government were all fully tried and considered. As stated above, there was no evidence whatever of fraud developed in the court hearings which covered all the details. The plaintiffs in Bulloch II again put on the evidence on this issue and were unable to make a case against anyone concerned. The non-party individuals were there considered by name. The hearings were conducted on the new complaint of plaintiffs and the trial court directed its decision to the complaint rather than to the separate motion to reopen the old case.

It appears that a Congressional hearing relating to the test firings was held several years before the plaintiffs filed this second suit. Some of the plaintiffs appeared at the hearings and made statements and their attorney filed a "report." Only the complainants' side of the dispute was so presented. The trial court makes reference to these 1979 hearings and apparently gave them some weight in its find-

ings. The plaintiffs put great emphasis on the Congressional hearings and all or much of the report of the hearings was made a part of the record. We must instead rely entirely on the record made during the proceedings in Bulloch I and II within the Rules of Federal Procedure.

The public discussions of atomic energy and weapons have heated up to a great degree since Bulloch I 25 years ago. There is now a much greater public awareness of issues relating to atomic bombs and radiation. This is certainly as it should be.

This recent increase in the heat, the light, and awareness of atomic energy is all worthwhile, but we are unable to find in it any reason, as the plaintiffs apparently would have us do, to overturn the considered judgment of the court reached 25 years ago.

The plaintiffs also have a heavy burden to demonstrate why they waited these many years to make the assertions they have made in this action. The only event of any consequence which has taken place and which seems to be relied on by plaintiffs were the 1979 Congressional hearings referred to above. The trial court also seems to have given this event some weight, as mentioned. This cannot be enough alone nor with the other assertions. The hearings purported to consider only one side of the incidents and only the plaintiffs and their attorney sought to use it to present their claims and personal views. If this was the source of the data upon which this proceeding is sought to be based, it must fail.

The judgment in Bulloch I was entered in the fall of 1956, as mentioned, and by the same court from which this appeal is taken and by the same judge. The parties are the same as well. This action to set aside the judgment was filed in February of 1981. As mentioned, it is basically a

separate or independent action to set aside the judgment on equitable grounds, although it does mention Rule 60 (b). Before judgment was entered in 1956 the plaintiffs were asserting that there had been some sort of "cover-up." However, they acknowledged that they did nothing about it for 20 or 25 years. Plaintiffs have produced nothing to explain why they waited for 25 years to file this action and of more importance they have come forward with nothing of any consequence which was not available to them at Bulloch I. This has been referred to above in the consideration of the specific points mentioned by the court. But to repeat, everything was then available to plaintiffs and they made their choice as to what to do and what to use. The trial court in its memorandum opinion in Bulloch II describes much of the material, reexamines it and draws conclusions.

During the 25-year period witnesses Thomsett and Holmes have died, and there is no physical evidence available. The principal witness for plaintiffs in Bulloch II, Mr. Knapp, acknowledged that nothing would be accomplished by any additional study of the circumstances. Thus it must be concluded that the plaintiffs would have the court reexamine the same material that was available in 1956. As mentioned, the public attitude toward atomic testing and atomic energy has changed very much since 1956 as has public awareness. The Congressional hearings in 1979 demonstrated this quite clearly, and the plantiffs would use them as a reason to retry their case.

This case demonstrates the very good reasons why judgments should be final and should not be disturbed. The plaintiffs to prevail must have shown by clear and convincing evidence that there was fraud on the court, and all doubts must be resolved in favor of the finality of the judgment.

It is beyond question that a federal court may investigate a question as to whether there was fraud in the procurement of a judgment. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 66 S. Ct. 1176, 90 L.Ed. 1447. This is to be done in adversary proceedings as in the case before us. *See Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250; *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184; and *United States* v. *Throckmorton*, 98 U.S. (8 Otto) 61, 25 L.Ed. 93.

Fraud on the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court, *H. K. Porter Co., Inc.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (6th Cir.). It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function — thus where the impartial functions of the court have been directly corrupted.

The basic decisions of the Supreme Court are *Throckmorton, Hazel-Atlas,* and *Universal Oil Products,* cited above. These cases considered the basic issues raised in cases to set aside judgments and demonstrate with *Marshall* v. *Holmes*, 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870, the nature of the fraud and the proof required for relief as set out in the preceding paragraph.

As to actions for relief from fraud on the court it is generally held that the doctrine of laches as such does not apply, but unexplained delays bear on the basic concept of the finality of judgments and the proof. Rule 60 (b) does not impose a time limit on motions asserting fraud on the

court. The rule also, of course, recites that it does not limit the power of the courts to consider independent actions to relieve a party from a judgment.

In *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714 (10th Cir.), we considered a claim under Rule 60 (b). It was there said that: "Relief under the rule may be granted when the application is clearly substantiated by adequate proof." There also it appeared that the documents complained of were in whole or in part available at trial but no use was made of them. In *Chisholm* v. *House,* 160 F.2d 632 (10th Cir.), we considered equitable relief from a judgment for fraud, and considered the intrinsic and extrinsic distinction, citing *United States* v. *Throckmorton,* 98 U.S. (8 Otto) 61.

The plaintiffs in their independent action asserted fraud on the court in the withholding of data, records and letters. They have set forth extravagant statements in their briefs which have not been borne out by the record. The showing made by plaintiffs in the Bulloch II hearings falls far short of proof of fraud on the court or any other kind of fraud.

As mentioned, the trial court concluded in Bulloch II that there had been a fraud on the court (the same judge) in Bulloch I. In so doing, the court seems to have placed much, if not controlling, weight on the hereinabove described development (prior to Bulloch I) of the opinion of the veterinarians during the course of the investigations. We have considered this carefully (with the other factors raised by the trial court) and must conclude that nothing was demonstrated which would constitute fraud on the court.

We must thus conclude that the trial court was so in error and its conclusion and judgment constituted an abuse of discretion. The award of attorney fees must also be set aside.

The judgment of the trial court is set aside. The case is REVERSED and REMANDED.

McKAY, Circuit Judge, with whom SEYMOUR, Circuit Judge, joins, dissenting.

For the first time in the history of the Tenth Circuit, we have overturned a district court's grant of a new trial under Rule 60 (b) of the Federal Rules of Civil Procedure. What makes this action even more remarkable is that the decision of the trial judge was based on his finding that a fraud had been committed on his court in a case tried to the bench.

Not only has this circuit never reversed a trial court's grant of a new trial under 60 (b) but, in reviewing cases decided by the other circuits in the past five years, I could find only one in which such a decision was reversed.* Further, my review of the past forty years of Supreme Court cases revealed no case in which the Court reversed a circuit court's affirmance of the grant of a 60 (b) new trial. *See generally* 11 Wright and Miller, *Federal Practice and Procedure* § 2872 (1973). Admittedly, the dearth of appellate decisions overturning the grant of 60 (b) new trials does not establish a principle that it should not be done, but it does starkly highlight the severity of the constraints against so doing.

The historical reticence of appellate courts to overturn the grant of a new trial is not surprising in view of the applicable appellate standard. A 60 (b) motion is addressed to the sound discretion of the trial court and will not be disturbed unless the trial court has manifestly abused its

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* In *Corex Corp. v. United States*, 638 F.2d 119 (9th Cir. 1981), the Ninth Circuit reversed a trial court's grant of a new trial under Rule 60 (b). Unlike the case at hand, however, the trial court's decision was not based upon the ground of fraud, but upon the ground that new evidence had been discovered. Because all of the new evidence concerned events that had occurred after the end of the trial, the Ninth Circuit held that it was "not newly discovered evidence within the meaning of the rules."

discretion. *Caribou Four Corners, Inc.* v. *Truck Insurance Exchange,* 443 F.2d 796, 799 (10th Cir. 1971). Implicit in the notion of trial court discretion is the recognition that "[a]s an appellate court it is not for us to determine whether the trial court reached the correct decision, but whether it reached a permissible one in light of the evidence." *Higgins* v.*Oklahoma,* 642 F.2d 1199, 1202 (10th Cir. 1981).

Further contributing to the dearth of decisions overturning the grant of a new trial under 60 (b) is the well-established principle of appellate review that:

> When a case is tried to the district court, the resolution of conflicting evidence and the determination of credibility are matters particularly within the province of the trial judge who heard and observed the demeanor of the witnesses.

Dowell v. *United States,* 553 F.2d 1233, 1235 (10th Cir. 1977). This principle has its roots not in any complicated jurisprudential theory but in the simple, commonsense notion that a judge who observed the trial is in a better position to assess credibility than a judge who did not. The Supreme Court recently vigorously reminded the circuit courts of the limited scope of their review of trial court factual findings in *Anderson* v. *City of Bessemer City, North Carolina,* — U.S. —, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The Court noted that even district court findings based on physical or documentary evidence or inferences from other facts could not be overturned unless clearly erroneous. The Court further held that:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.... [W]hen a trial judge's

> finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

— U.S. at —, 105 S.Ct. at 1512-13.

This principle of deference, coupled with the abuse of discretion standard of review, makes the majority's opinion doubly perplexing. In leaping an unprecedented hurdle — the overturning of the grant of a new trial under Rule 60 (b) — the majority employs an impermissible means — the substitution of its own assessment of credibility for that of the trial judge. I will not attempt to chronicle every instance of such substitution. A few examples should suffice to illustrate the error.

Plaintiffs initially sued the government in 1955 when an unusually high number of their sheep died after having grazed in an area adjacent to the Nevada test site following a series of atomic tests. The district court found for the government. *Bulloch I,* 145 F.Supp. 824 (D. Utah 1956). In the years following this decision, the government's virtual monopoly on information regarding the effects of radiation ended. In 1979 Congress conducted public hearings regarding the health effects of the Nevada nuclear tests of the 1950's and 1960's. Through these hearings, plaintiffs learned information regarding their claim of which they had previously been unaware. On the basis of this information plaintiffs made further investigations that led to the commencement of *Bulloch II,* 95 F.R.D. 123 (D. Utah 1982), in which plaintiffs sought to have the prior judgments vacated for fraud on the court. The trial judge found that fraud had been committed on his court in the prior action, and ordered a new trial.

Plaintiffs alleged in *Bulloch II* that the government fraudulently withheld significant information in the so-called "Bustad Comparative Study" offered into evidence in *Bulloch I*. The study, which was conducted by Dr. Bustad for the Atomic Energy Commission, examined the effect of radioactive iodine on sheep. It concluded that "the Utah sheep showed no evidence of the radiation damage observed in experimentally treated sheep." *Bulloch II*, 95 F.R.D. at 131-32. Plaintiffs' attack on the study in *Bulloch II* was two-fold. They alleged that the study was misleading because its conclusion was untrue and because information so indicating – regarding the substantial similarities between Utah lambs exposed during gestation, so-called "fetal lambs," and experimental fetal lambs – was suppressed.

The government argues that the conclusion of the Comparative Study was correct because, even though there were similarities between the Utah fetal lambs and the experimental fetal lambs, those similarities were appropriately viewed as coincidental. The government contends this to be the case because of what it views as a determinative *dis*-similarity between the thyroids of plaintiffs' sheep and the experimental animals. The government does not deny that the information regarding fetal lambs would have been important to the plaintiffs' investigation and to the district court's consideration of the issue of causation. Dr. Bustad so indicated in his testimony in *Bulloch II*, Appellees' Appendix, vol. 1, at 275, 280, as did Dr. Trum. Appellees' omission of this information from the Comparative Study on the grounds that the Study was made merely for the information of the Atomic Energy Commission, which already had the fetal lamb report, the fetal lamb report was cited in footnotes to the Comparative Study, and the report would have confused the district court.

The trial court held that the fetal lamb reports had been wrongfully withheld at trial, were of substantial significance and weigh[t] in favor of plaintiffs' claims, and were essential to a fair and proper consideration of the merits of those claims by the court. The court further found that regardless of whether or not Dr. Bustad buried the information in a footnote reference as a ploy, those who managed the government's case knew of the information and wrongfully withheld it at trial. In overturning the district court, the majority finds that "the plaintiffs . . . had available all the pertinent data on the experiments with clear references-citations to the details." Maj.Op. at 1119. This analysis wholly misconceives the nature of our appellate inquiry. As the Supreme Court noted in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, 246, 64 S.Ct. 997, 1001, 88 L.Ed. 1250, *reh'g denied*, 322 U.S. 772, 64 S.Ct. 1281, 88 L.Ed. 1596 (1944), a case that also involved an allegedly fraudulent document:

> even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be condoned for that reason alone . . . . [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Thus, the issue on review is not whether plaintiffs could have found the fetal lamb information if they had been more diligent but, rather, whether the government sought to diminish the likelihood of their finding the information.

If the intention of those managing the government's case in *Bulloch I* was indeed to suppress the fetal lamb report, it is not unthinkable that they would have sought the middle ground between complete suppression and complete disclosure that an artfully disguised footnote can provide. Regardless, it is not our function to determine whether or not the government intended to suppress the fetal lamb report. *Bulloch I* was tried to the bench. The district court not only observed the witnesses in that first trial, but is singularly aware of the effect the fetal lamb information would have had on his decision. That same district judge heard contradictory testimony in *Bulloch II* regarding the reasons for the conclusion of the Comparative Study and for exclusion of the fetal lamb report from that Study. Having observed the witnesses and examined the evidence, the district court chose to believe the plaintiffs' witnesses and the plaintiffs' evidence. The majority, armed only with the cold record, chooses to believe the government's witnesses and the government's evidence; this, despite the constraints against so doing inherent in the abuse of discretion standard of review and the well-established principle that the assessment of credibility is particularly within the province of the trial judge.

The majority errs in the same way with regard to the issue of whether the government gave misleading answers to interrogatories. Among the interrogatories and answers were these:

> Interrogatory #28: Did anyone involved in the investigation disagree with the report? [AEC report denying causal connection between radiation and sheep injury.]
>
> Answer: We are not aware of anyone who is involved in the Commission's investigation of the alleged sheep losses who now disagree with the report issued by the AEC.

> Interrogatory #29: Did anyone conclude that radioactive fallout was a possible cause of the injury to the sheep?
>
> Answer: We do not know of anyone connected with the AEC's investigation of the alleged sheep losses who has now concluded that radioactive fallout was a possible or probable cause of the injury to the sheep.

The district court found that the Government's answers were both intentionally evasive and untrue:

> The answers were highly deceptive in that they led plaintiffs to believe that those on whom reliance had been placed for making out a prima facie case had now changed their minds in unanimous support of the views of the defendant and discouraged the exploration in depth by plaintiffs of their original opinions by inducing apprehension on the part of plaintiffs' counsel that this would only emphasize the adverse effect of the changed opinions.

Bulloch II, 95 F.R.D. at 139.

The majority gives short shrift to plantiffs' contentions with regard to the interrogatories:

> We find nothing to demonstrate that misleading answers were made by the Government in Bulloch I. The plaintiffs were familiar with all the background data as hereinabove described. With this familiarity they chose not to seek additional answers or clarifications.

Maj.Op. at 1119.

The majority's finding that there is nothing to demonstrate that the government gave misleading answers is unfounded. Dr. Veenstra testified in *Bulloch II* that he never changed his original opinion that radiation may have been a contributing cause of the injuries to the sheep. Appellees'

Appendix, vol. 2, at 431, 464, 466-67. There are strong indications in the record that Dr. Thompsett did not actually change his original position that radiation was a contributing cause of the damage to the sheep, despite his deposition testimony and letter to the contrary. Appellees' Appendix, vols. 1 & 2, at 229-30, 233-34, 644-45, 672-74. Dr. Trum, who assisted in the preparation of the interrogatory answers, has indicated, with some equivocation, that he was aware that neither Dr. Veenstra nor Dr. Thompsett had changed his original position. Appellees' Appendix, vol. 1, at 209-11, 227-30. Further, the record indicates that government attorneys were aware of these dissenting opinions. Appellees' Appendix, vol. 2, at 685-87.

Moreover, the majority's focus on plaintiffs' lack of diligence is again misplaced. The issue is not whether plaintiffs could have discovered the government's answers to have been misleading but, rather, whether the government intentionally responded incompletely and untruthfully to the plaintiffs' queries. The trial court's finding that the government engaged in intentional concealment is bolstered by the fact that government attorneys refused to reveal relevant facts even in the face of plaintiffs' explicit claim in *Bulloch I* that they were concealing such facts. *Bulloch II*, 95 F.R.D. at 127-28. This concealment is made even more egregious by the fact that government lawyers in civil actions have the "responsibility to seek justice and to develop a full and fair record . . . ." *Model Code of Professional Responsibility*, EC 7-14 (1980).

Finally, the majority suggests that even if the district court judge was correct in findings that the government had intended to suppress the fetal lamb reports and to respond untruthfully to the interrogatories, such findings do not support his holding that a fraud had been committed on his court. The majority argues that fraud on the court

is limited to instances "where the impartial functions of the court have been directly corrupted." The majority further asserts that fraud on the court "is not fraud between the parties or fraudulent documents, false statements or perjury."

In support of this curiously narrow construction of what constitutes fraud on the court, the majority offers two cases that not only do not support it, but directly contradict it. The majority points to *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944) as authority for the proposition that fraudulent documents cannot constitute fraud upon the court. This ignores the fact that the *Hazel-Atlas* Court found precisely the opposite — that fraudulent documents, in that case an article whose authorship had been misattributed, can constitute such fraud. *Id.* at 247, 250, 64 S.Ct. at 1001, 1003. The case of *H. K. Porter Co., Inc.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (6th Cir. 1976) does, as the majority argues, stand for the proposition that nondisclosure by a party or witness is not grounds for an action for fraud upon the court. The *Porter* court goes on to make clear, however, that if Porter's attorneys had known of and sponsored such misdeeds as nondisclosure, misrepresentation or perjury, it would have been quite another matter. "Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court." *Porter*, 536 F.2d at 1119. In the case at hand, the district court stated, with ample support in the record, that:

> it appears clearly and convincingly from all of the circumstances of the litigation as they now appear, and I find, that one or more of defendant's attorneys knowingly participated in a program for the concealment from the Court of facts which he or they knew or in good conscience should have

> known the Court was entitled to have placed before it in order properly to rule upon the determinative issues of the case.

Bulloch II, 95 F.R.D. at 142. If, as the district court found, the government attorneys in this case intentionally withheld information, offered into evidence an intentionally misleading document, and pressured witnesses to testify in a certain way, it can hardly be argued that such actions do not constitute fraud on the court under Rule 60 (b).

While I have reviewed only two of the district court's findings in detail, it is important to make mention of the full scope of his findings in support of his holding that fraud had been committed, and to place that holding in its historical context. The district court found that the government intentionally deceived the court; improperly pressured witnesses not to testify as to their real opinions or to discount their qualifications and opinions; intentionally withheld a vital report; presented information in another report in such a manner as to be deceitful, misleading, or only half true; deceptively answered interrogatories; and deliberately concealed significant facts regarding the possible effects of radiation upon the plantiffs' sheep. The court found that by these actions the government manipulated the processes of the court to its improper and unacceptable advantage. *Bulloch II*, 95 F.R.D. at 144. Further, the trial court's opinion is informed by a sense of historical perspective wholly lacking in the majority's opinion. The trial court recognized that the government committed this fraud at a time when "the AEC and those associated with it enjoyed a virtual monopoly of knowledge in comparison to that independently available to the plaintiff sheepowners', their attorneys and, indeed the Court . . . ." *Bulloch II*, 95 F.R.D. at 144. Thus, the government's concealment and deception was even more egregious at the time of *Bulloch I* than it would be today.

In conclusion, I again wish to point to the Supreme Court's recent opinion in *Anderson*. The Court noted that:

> "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."... This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."... If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

— U.S. at —, 105 S.Ct. at 1511-12 (citations omitted). Thus, our task as an appellate court is not to determine whether the radiation caused the damage to plaintiffs' sheep. Nor is it to assess the diligence of the plaintiffs' counsel. Nor is it even to determine whether the government committed a fraud on the district court. Our task is to determine whether the district court's finding of fraud was so clearly erroneous as to constitute a manifest abuse of discretion.

The testimony regarding whether the government intentionally tried to mislead the plaintiffs and the district court was contradictory. In the end, the issue turns on the assessment of credibility. Plaintiffs have presented substantial

evidence that, if believed, supports a finding of fraud on the district court. In view of the trial court's better perspective for making the assessment of which evidence should be believed, and the constraints inherent in the abuse-of-discretion appellate standard, I cannot agree that this district court judge abused his discretion in overturning his previous decision because it had resulted from the commission of a fraud on his court. I would affirm.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 82-2245, 82-2352
DC Nos. C-81-0123C, C-19-55, C-22-55, C-23-55, C-26-55, C-27-55, C-42-55

DAVID BULLOCH, MCRAE BULLOCH, KERN BULLOCH, DOUGLAS CORRY, A. C. SEEGMILLER, MYRON HIGBEE, NELSON WEBSTER, LILLIAN W. CLARK, for herself and as personal representative of the estate of Douglas C. Clark, Deceased, LAMBETH BROTHERS LIVESTOCK, a partnership, T. RANDALL ADAMS, DEE EVANS and JOHN DOES I through XX,
PLAINTIFFS-APPELLEES,
v.
UNITED STATES OF AMERICA,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
For the District of Utah

Decided Mar. 28,1984

[ORDER]

Before: SETH, Chief Judge, HOLLOWAY, MCWILLIAMS, BARRETT, DOYLE, MCKAY, LOGAN and SEYMOUR, Circuit Judges.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing in banc filed by appellees in the captioned appeals.

Upon consideration whereof, appellees' petition for rehearing and suggestion for rehearing in banc are granted.

/s/ HOWARD K. PHILLIPS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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PLAINTIFFS-APPELLEES,

v.

UNITED STATES OF AMERICA,

DEFENDANT-APPELLANT.

Appeal from the United States District Court
For the District of Utah

Decided Nov. 23, 1983
Rehearing Granted March 28, 1984

OPINION

Before: SETH, Chief Judge, McWILLIAMS, Circuit Judge, and KERR, District Judge.*

SETH, Chief Judge.

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* Honorable Ewing T. Kerr, United States Senior District Judge for the District of Wyoming, sitting by designation.

This is an appeal from a judgment by the trial court which granted relief to the plaintiffs in an independent action to set aside, on the ground of fraud, a judgment against them entered by the same court in 1956. Relief was also sought under Rule 60 (b). The original action was a Tort Claims Act suit for the loss of sheep asserted to have been caused by radiation from atomic tests at the Las Vegas Test Site in 1953.

In the original case the findings and conclusions were that the sheep had not died as a consequence of the atomic tests but had died from other causes.

The original Tort Claims Act suit is referred to by the parties as *Bulloch I*. A very small portion of the testimony was transcribed and the notes have been lost. Only a few of the exhibits are available. There are some depositions and briefs which have survived. The trial judge in his oral and written findings and conclusions summarized the testimony. The opinion appears at 145 F.Supp. 824.

The plaintiffs in the appeal before us assert that there was information withheld from them in the original suit, that witnesses for the Government were pressured, and there was fraud on the court. The plaintiffs also filed a motion to set aside the original judgment. The trial court entered judgment in the separate action and ordered that the judgment of 1956 be set aside by reason of fraud on the court. The court also awarded attorney fees to the plaintiffs. The Government has taken this appeal.

The record in *Bulloch I* which has survived is very limited. As mentioned, a very small part of the testimony as transcribed is available. From the depositions, briefs and memoranda and with the trial court's summary, the trial as to the specific points relied on by the trial court in *Bulloch II* can be reconstructed with some confidence. Most of the witnesses from *Bulloch I* testified again.

The trial court in its conclusions and findings in *Bulloch II*, 95 F.R.D. 123, makes several general statements as to fraud and withholding of information in *Bulloch I*. The trial court makes reference to four specific events at trial of *Bulloch I* or items of proof. Presumably the general observations or statements as to fraud are drawn from these particulars.

The four particular items mentioned by the trial court are:

> (1) The Bustad Report—a comparison of radiation tests on sheep at Hanford with the data on the Utah sheep. The Hanford experiments had been made several years before the Utah suit. The trial court concluded that the comparison omitted essential facts.
>
> (2) That the Government had given misleading information as to measures of radiation at certain places – radiation dosages.
>
> (3) That witnesses, especially the veterinarians, had been "pressured" to testify in a certain way.
>
> (4) That the Government had given misleading answers to interrogatories.

Estimates of radiation dosages were, of course, a significant part of the *Bulloch I* trial. The amount of radiation to which plaintiffs' sheep had been exposed was a factual issue at the first trial. Plaintiffs' Trial Memorandum in *Bulloch I* details the radiation dosages which were the subject of their claim, and an exhibit was presented by plaintiffs to demonstrate the point. The plaintiffs had available and used the same basic data used by the Government to make its estimates. The plaintiffs also presented at the original trial additional radiation maps apparently derived from their own sources. The record thus shows that all the information the Government had as to dosages was available to plaintiffs, and that they also had other data.

The data and maps presented the material in a detailed manner. It is apparent that during the investigation by the Government preceding the trial the dosages were revised as it progressed. These revisions were always upward and were, according to the testimony, to give maximum levels and thus to be above "probable average values." The plaintiffs were aware of these revisions and the reasons long before the trial. Since all data was available the parties could trace its development during the investigations. There was also available the reports, with the opinions of the experts, which will be mentioned later but which show a change of opinion as the investigations progressed and as experiments were conducted. All of this was before *Bulloch I,* and revealed in detail to plaintiffs. There was no evidence presented at *Bulloch II* that the maps or data were incorrect.

The plaintiffs assert that the Government knew at the time of the first trial that there were unexplained small areas of higher radiation within generally lower areas. These were referred to in the second trial as "hot spots." The plaintiffs assert that this phenomenon was not revealed at the first trial, and it was not. The plaintiffs state that this condition was discovered with the detonation of the Boltzman shot, and the record so reflects, but this event was not until 1957, and hence after the first trial, so nothing was withheld as to this condition at *Bulloch I* as no one knew of its existence.

All the witnesses who testified in *Bulloch I* who were supposed to have participated in the suppression of evidence testified in *Bulloch II*. They also there testified specifically that there had been no suppression whatever of evidence at *Bulloch I*. They likewise testified that there had been no attempt to pressure them as to their opinions or as to their testimony.

It may be repetitious, but the most significant aspect of the records in *Bulloch I* and *II* is that all the information, data and witnesses were available to plaintiffs at *Bulloch I*. The plaintiffs chose to use some of the data and not other parts; they likewise selected among the witnesses who were made available for depositions and for trial; also they limited the extent of their consideration of the reports and studies which were provided to them. Plaintiffs in *Bulloch I* thus tried the case the way they wanted. They made decisions on what to put on as trial strategy and limited their review of data reported. It appears that they would not try the case the same way should they have another chance although the material is the same.

As mentioned, the record shows that at *Bulloch I* the Government provided all data plaintiffs asked for. They were given the AEC file data on the investigation of the sheep deaths. The Government made an offer to make available the individuals who had participated in the study, and any others. Other reports of experiments were provided and the experts were available for depositions. The Government did have all the technical data in 1953 and 1954, and conducted the experiments and investigations, but again this was made available to plaintiffs. This is all the data that is now available.

The plaintiffs had knowledge of the series of reports made by the Government veterinarians during the course of the investigations. They were aware that the conclusions of each were not the same, and were aware that positions changed as the pretrial investigation progressed. We find nothing whatever that could have misled plaintiffs as they could trace the progress of the investigation from the reports which were provided to them. Again, they had the data the Government had. If they did not choose to use it that was a decision they made. The reports of the investigation

were quoted at length in plaintiffs' *Bulloch I* trial memorandum, and the depositions show they had the documents and the information. Dr. Holmes, one of the persons participating in the investigation, was called as a witness by plaintiffs, and they had several pre-*Bulloch I* trial conversations with him. Dr. Holmes had died before *Bulloch II*. The plaintiffs assert that the Government presented an untrue representation as to the views of Dr. Holmes at *Bulloch I*, but again, he testified for plaintiffs and they had a full opportunity to interview him. The plaintiffs assert that the correct version of his views was revealed by certain documents they now refer to; however, these documents were available to them at the first trial.

The record shows that the trial court in *Bulloch I* considered the views of the veterinarians Veenstra, Holmes and Thompsett, and their development during the investigation. There appears to be nothing unusual about this.

The AEC facilities at Hanford, Washington had done some experiments from 1949 to 1953 (before *Bulloch I*) to study radiation damage to sheep and lambs. The sheep were fed radioactive material in this experiment. The Government asked the officials at Hanford to compare the data on the Utah sheep. The comparison was made, and the report was known at *Bulloch I* as the Bustad Comparative Study. This report concluded that the "Utah sheep showed no evidence of the radiation damage observed in experimentally treated sheep."

The experts testified that if the Hanford ewes ingested radioactive material they would develop a hypothyriod condition, and the lambs would be weak and die not long after birth. The Utah ewes however had not developed any abnormalities of the thyroid, and thus the experts found no significant similarity between the two groups and concluded the Utah sheep and lambs had not died from

radioactive exposure. The trial court did not follow the testimony of the experts in the second trial and relied only on the fact that the lambs were weak and died young in both groups to establish a similarity. The trial court thus concluded that the Bustad report did not reveal all it should have by not comparing the early death of lambs as the important factor and thus something was withheld. The experts relied on the thyroid comparison as the significant factor.

All the Hanford data was published and was available to the public in 1953. This comparison listed the previous reports and it referred the readers to the listed reports for the "details of the experiments." The Report recited that it only purported to be a summary of the experiments and conclusions. The basic data was cited. The plaintiffs thus had available all the pertinent data on the experiments with clear references-citations to the details. The damages caused by radiation at the Hanford experiments were there clearly identifiable, as mentioned, but there was no such damage in the Utah sheep.

We find nothing to demonstrate that misleading answers were made by the Government in *Bulloch I*. The plaintiffs were familiar with all the background data as hereinabove described. With this familiarity they chose not to seek additional answers or clarifications.

The Comparative Study referred to above became a central issue in *Bulloch II* in the trial court's finding of failure to disclose by the Government, but there is no basis in the record to suggest that anything was withheld.

The several specific items referred to by the trial court in its findings in the case before us have been considered in the foregoing description. As mentioned at the outset, these are the only particular matters referred to and the

balance of the trial court's findings and conclusions are in general terms, and could only be based on these factors.

The trial court thus (1) mentioned the Bustad report and asserted that information had been withheld; (2) it mentioned that the Government had given misleading information as to radiation dosages; (3) that the veterinarians had been pressured by the Government; and (4) that misleading answers had been given to interrogatories by the Government. Each of these specifics have been considered in relation to the record in the proceedings appealed from and to what original record and briefs are extant. We must conclude that none of these several findings or conclusions are supported by the record. The information, data, reports, maps, experiments and witnesses were all available to plaintiffs at the first trial. The data is the same now. They tried their case on the basis of their then best judgment in the selection of witnesses, interviews, the evaluation of data and reports, and the consideration of the position of the experts.

The trial court in its Memorandum shows that it would draw different conclusions and inferences from the testimony, and from the developing opinions of the veterinarians.

We have not mentioned the Los Alamos Scientific Laboratory comparative study of radiation burns (in experiments) and the lesions on the Utah sheep. The analysis of tissues, organs, bones and blood samples made by Doctors Comar, Rust and Trum showed no evidence of radiation injury to the sheep in the flocks of plaintiffs where the losses took place. A tissue analysis was made on the sheep by the Utah University College of Medicine and the conclusion was reached that the sheep had been exposed to radiation but the examination concluded that there had been no acute effects from the exposure. The Hanford com-

parative study, as mentioned, concluded that the sheep had not died from exposure to radiation.

In *Bulloch I* the conclusion of the experts was that the sheep and lambs had died as a result of unprecedented cold weather during the lambing and shearing, together with malnutrition, also to generally poor range conditions and to common diseases which caused the skin lesions and deaths. These conditions were established by the evidence. The losses began after an initial detonation but before the detonation of the "Harry" test. The expert witnesses who were the leading authorities on the subject thus concluded that the losses were not due to radiation. There was no evidence presented that humans in the areas with the sheep nor animals such as the sheep dogs or horses, which were with the sheep, were affected.

It is apparent that in *Bulloch II* the assertions of fraud against the Government, the witnesses, the Government employees, the experts and the attorneys for the Government were all fully tried and considered. As stated above, there was no evidence whatever of fraud developed in the court hearings which covered all the details. The plaintiffs in *Bulloch II* again put on the evidence on this issue and were unable to make a case against anyone concerned. The non-party individuals were there considered by name. The hearings were conducted on the new complaint of plaintiffs and the trial court directed its decision to the complaint rather than to the separate motion to reopen the old case.

It appears that a Congressional hearing relating to the test firings was held several years before the plaintiffs filed this second suit. Some of the plaintiffs appeared at the hearings and made statements and their attorney filed a "report". Only the complainants' side of the dispute was so presented. The trial court makes reference to these

1979 hearings and apparently gave them some weight in its findings. The plaintiffs put great emphasis on the Congressional hearings and all or much of the report of the hearings was made a part of the record. We must instead rely entirely on the record made during the proceedings in *Bulloch I* and *II* within the Rules of Federal Procedure.

The public discussions of atomic energy and weapons have heated up to a great degree since *Bulloch I* 25 years ago. There is now a much greater public awareness of issues relating to atomic bombs and radiation. This is certainly as it should be.

This recent increase in the heat, the light, and awareness of atomic energy is all worthwhile, but we are unable to find in it any reason, as the plaintiffs apparently would have us do, to overturn the considered judgment of the court reached 25 years ago.

The plaintiffs also have a heavy burden to demonstrate why they waited these many years to make the assertions they have made in this action. The only event of any consequence which has taken place and which seems to be relied on by plaintiffs were the 1979 Congressional hearings referred to above. The trial court also seems to have given this event some weight, as mentioned. This cannot be enough alone nor with the other assertions. The hearings purported to consider only one side of the incidents and only the plaintiffs and their attorney sought to use it to present their claims and personal views. If this was the source of the data upon which this proceeding is sought to be based, it must fail.

The judgment in *Bulloch I* was entered in the fall of 1956, as mentioned, and by the same court from which this appeal is taken and by the same judge. The parties are the same as well. This action to set aside the judgment was filed

in February of 1981. As mentioned, it is basically a separate or independent action to set aside the judgment on equitable grounds, although it does mention Rule 60 (b) . Before judgment was entered in 1956 the plaintiffs were asserting that there had been some sort of "cover-up". However, they acknowledged that they did nothing about it for 20 or 25 years. Plaintiffs have produced nothing to explain why they waited for 25 years to file this action and of more importance they have come forward with nothing of any consequence which was not available to them at *Bulloch I*. This has been referred to above in the consideration of the specific points mentioned by the court. But to repeat, everything was then available to plaintiffs and they made their choice as to what to do and what to use. The trial court in its memorandum opinion in *Bulloch II* describes much of of the material, reexamines it and draws conclusions.

During the 25-year period witnesses Thomsett and Holmes have died, and there is no physical evidence available. The principal witness for plaintiffs in *Bulloch II,* Mr. Knapp, acknowledged that nothing would be accomplished by any additional study of the circumstances. Thus it must be concluded that the plaintiffs would have the court reexamine the same material that was available in 1956. As mentioned, the public attitude toward atomic testing and atomic energy has changed very much since 1956 as has public awareness. The Congressional hearings in 1979 demonstrated this quite clearly, and the plaintiffs would use them as a reason to retry their case.

This case demonstrates the very good reasons why judgments should be final and should not be disturbed. The plaintiffs to prevail must have shown by clear and convincing evidence that there was fraud on the court, and all doubts must be resolved in favor of the finality of the judgment.

It is beyond question that a federal court may investigate a question as to whether there was fraud in the procurement of a judgment. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447. This is to be done in adversary proceedings as in the case before us. *See Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250; *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184; and *United States* v. *Throckmorton*, 98 U.S. 61, 25 L.Ed. 93.

Fraud on the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court. *H. K. Porter Co., Inc.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (6th Cir.). It is thus fraud where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function — thus where the impartial functions of the court have been directly corrupted.

The basic decisions of the Supreme Court are *Throckmorton, Hazel-Atlas,* and *Universal Oil Products,* cited above. These cases considered the basic issues raised in cases to set aside judgments and demonstrate with *Marshall* v. *Holmes,* 141 U.S. 589, 12 S.Ct. 62, 35 L.Ed. 870, the nature of the fraud and the proof required for relief as set out in the preceding paragraph.

As to actions for relief from fraud on the court it is generally held that the doctrine of laches as such does not apply, but unexplained delays bear on the basic concept of the finality of judgments and the proof. Rule 60 (b) does not impose a time limit on motions asserting fraud on the court. The rule also, of course, recites that it does not

limit the power of the courts to consider independent actions to relieve a party from a judgment.

In *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714 (10th Cir.), we considered a claim under Rule 60 (b). It was there said that: "Relief under the rule may be granted when the application is clearly substantiated by adequate proof." There also it appeared that the documents complained of were in whole or in part available at trial but no use was made of them. In *Chisholm* v. *House,* 160 F.2d 632 (10th Cir.), we considered equitable relief from a judgment for fraud, and considered the intrinsic and extrinsic distinction, citing *United States* v. *Throckmorton,* 98 U.S. 61, 25 L.Ed. 93.

The plaintiffs in their independent action asserted fraud on the court in the withholding of data, records and letters. They have set forth extravagant statements in their briefs which have not been borne out by the record. The showing made by plaintiffs in the *Bulloch II* hearings falls far short of proof of fraud on the court or any other kind of fraud.

As mentioned, the trial court concluded in *Bulloch II* that there had been a fraud on the court (the same judge) in *Bulloch I*. In so doing, the court seems to have placed much, if not controlling, weight on the hereinabove described development (prior to *Bulloch I*) of the opinions of the veterinarians during the course of the investigations. We have considered this carefully (with the other factors raised by the trial court) and must conclude that nothing was demonstrated which would constitute fraud on the court.

We must thus conclude that the trial court was so in error and its conclusion and judgment constituted an abuse of discretion. The award of attorney fees must also be set aside.

The judgment of the trial court is set aside. The case is REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. C-81-0123C

DAVID BULLOCH, McRAE BULLOCH, KERN BULLOCH, DOUGLAS CORRY, A. C. SEEGMILLER, MYRON HIGBEE, NELSON WEBSTER, LILLIAN W. CLARK, for herself and as personal representative of the estate of Douglas C. Clark, Deceased, LAMBETH BROTHERS LIVESTOCK, a partnership, T. RANDALL ADAMS, DEE EVANS and JOHN DOES I through XX,

PLAINTIFFS,

v.

UNITED STATES OF AMERICA,

DEFENDANT.

ORDER AND DECISION

Decided September 29, 1982

A. Sherman Christensen, Senior District Judge.

The plaintiffs having moved this Court for an award of attorney's fees under the Equal Access to Justice Act (the "EAJA"), 28 U.S.C. §2412, and the defendant having moved for a stay of the plaintiffs' appliction for attorney's fees until the completion of an appeal on the merits of the case, and in the alternative having opposed plaintiffs' application for attorney's fees and expenses, upon due deliberation and upon consideration of the motion for an award of attorney's fees and defendant's opposition thereto, the affidavit with exhibit of Dan S. Bushnell in support thereof,

the memoranda of the parties and upon all papers and proceedings heretofore had herein, and upon hearing oral argument, and the analysis and reasoning of the Court having been announced with the oral decision from the bench on the 23rd day of September, 1982, it is therefore:

ORDERED: that the defendant's opposition to plaintiffs' motion and defendant's motion to stay determination of the plaintiffs' motion for attorney's fees until thirty days after the completion of appellate proceedings on the merits is denied;

ORDERED: that the plaintiffs be awarded attorney's fees in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412, by reason of this Court's finding in this independent equitable action; and it is further

ORDERED: that the amount of the attorney's fees and expenses to be awarded in the instant action is determined to be $120,195.26; and it is further

ORDERED: that, by stipulating and agreeing to the amount of the attorney's fee to be awarded, that the defendant does not waive any right that it may have to appeal this Court's award of the attorney's fees.

DATED: Salt Lake City, Utah
September 29th, 1982

ENTER:

/s/ A. Sherman Christensen
United States District Judge

Approved as to form:

/s/ Henry Gill
Attorney for the Defendant

/s/ Bruce Findlay
Attorney for the Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Nos. C-81-0123C, C-19-55, C-22-55, C-23-55,
C-26-55, C-27-55, C-42-55

DAVID BULLOCH, MCRAE BULLOCH, KERN BULLOCH, DOUGLAS CORRY, A. C. SEEGMILLER, MYRON HIGBEE, NELSON WEBSTER, LILLIAN W. CLARK, for herself and as personal representative of the estate of Douglas C. Clark, Deceased, LAMBETH BROTHERS LIVESTOCK, a partnership, T. RANDALL ADAMS, DEE EVANS and JOHN DOES I through XX,

PLAINTIFFS,

V.

UNITED STATES OF AMERICA,

DEFENDANT.

DAVID BULLOCH, MCRAE N. BULLOCH, and KERN BULLOCH,

PLAINTIFFS,

V.

UNITED STATES OF AMERICA, DEFENDANT.

DOUGLAS CORRY, PLAINTIFF,

V.

UNITED STATES OF AMERICA, DEFENDANT.

A. C. SEEGMILLER and MYRON HIGBEE,
doing business as Seegmiller & Higbee, a Partnership,
Plaintiffs,

V.

UNITED STATES OF AMERICA, DEFENDANT.

NELSON WEBSTER, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

LILLIAN W. CLARK, personal representative of the estate of Douglas C. Clark, deceased, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

LAMBETH BROTHERS LIVESTOCK, a partnership, and T. RANDALL ADAMS, PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

Decided August 4, 1982

A. SHERMAN CHRISTENSEN, Senior District Judge.

MEMORANDUM, FINDINGS OF FACT AND CONCLUSIONS OF LAW

I MEMORANDUM

The first entitled action, C-81-0123C, is an independent suit in equity, and the other enumerated actions involve motions in reliance upon Fed.R.Civ.P. 60 (b) [1] to set aside

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[1] *(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominatel intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken . . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding . . . or to set aside a judgment for fraud upon the court . . . .

the various 1956 judgments for alleged fraud upon this court. Duplication of effort or procedural problems of whether such a claim should be presented by an independent action or by motions in the original actions have been avoided at the outset by consolidation of all of the actions for the purposes of the present attack upon the prior judgments.

Following discovery proceedings, pretrial conferences, and the denial of motions for summary disposition of the claims of the plaintiffs, trial of the fraud upon the court issue was had May 10-13, 1982. The matter now stands submitted following the filing by counsel of supplemental proposals for findings.

The Court, deeming itself fully advised, has concluded upon the basis of background circumstances of which judicial notice is taken, uncontroverted facts recited in the pretrial order, the resolution of disputed issues and conflicts in the evidence in accordance with the following findings of fact and discussion, and the conclusions of law appearing thereafter, that the 1956 judgments in the cases above designated should be vacated and the cases processed for retrial because of fraud practiced upon the court by representatives of the United States Government.

In 1955, six actions were brought against the United States by the sheep owners pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq., who alleged that atmospheric testing of nuclear devices in Nevada during the spring of 1953 had damaged their herds. The first of these actions (the Bulloch case) was processed and tried as representative of the others and in the hope that its final resolution might be dispositive of all. The Court denied the Government's motion to dismiss the complaint on the Government's contention that the testing was in the exercise of a discretionary function for which there could be no liability by

reason of an exception set out in section 2680 (a) of the Act. The Court held that in the context of the sheep owners' claims apart from the decision to carry out the tests there could be liability depending upon the circumstances proved at trial. *Bulloch* v. *United States,* 133 F.Supp. 885 (D.Utah 1955).

At the trial of the Bulloch case, the Court ruled in effect that the Government was negligent in monitoring the tests in view of the presence of sheep herds in areas likely to be affected. It observed that "[t]here were no advance warnings given or other precautions taken to safeguard the herders or their sheep," that there was no suggestion in the evidence of any unexpected development, "and that the Atomic Energy Commission did not attempt to ascertain the location of the sheep with or without reference to any prospective pattern of fallout dependent upon winds." It accordingly concluded that the case turned upon "whether damage did in fact occur to the Bulloch sheep as a result of atomic testing." *Bulloch* v. *United States,* 145 F.Supp. 824 (D.Utah 1956).

On the latter crucial issue the case failed essentially because of the overwhelming weight of the expert testimony marshaled by the Government to demonstrate that there was no possibility of radiation damage to the sheep, the renunciation of contrary views by two out of the three experts originally entertaining the opinions that radiation damage occurred,[2] the fact that laboratory experiments had

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[2] Of the three professional men who originally suggested radiation damage, two upon further consideration questioned their original diagnosis. None of them claimed to be particularly qualified in the field of radiation. On the other hand, some of the best informed experts in the country expressed considered and convincing judgment that radiation damage could not possibly have been a cause. *Bulloch II,* 145 F.Supp. at 827.

failed to support the theory of any such damage,[3] and the Government's explanation that a combination of drought, malnutrition and disease was the most likely cause. Notwithstanding the compelling nature of the scientific opinion, the Court was troubled by some circumstantial evidence suggesting a contrary conclusion and particularly unsatisfactory proof of any reasonable alternative to radiation damage.[4]

But believing the apparently unquestionable scientific evidence to be controlling, the Court entered judgment in favor of the Government and against the sheep owners. Notwithstanding the offer of plaintiffs' counsel to waive formal findings of fact, the Court incorporated written find-

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[3] Because of the concealment of significant laboratory testing by Dr. Bustad which was highly relevant as hereafter found, plaintiffs had to contend at the trial that the reported controlled experiments were largely irrelevant. Thus the Court observed in its decision at p. 827 that "plaintiffs argue that there were differences in the sheep involved in controlled experiments and the Bulloch sheep and that by reason of these differences a finding that radioactivity was not the cause of plaintiffs' damage would be possible."

[4] In its oral decision, the Court referred to the attempts of plaintiffs' counsel to question the applicability of the controlled experiments relied upon by the Government, and indicated the problem of setting up its own ideas of the inapplicability of the tests as against the expert opinion, and added:

> But if I should do that I would be confronted by the positive testimony that the largest amount of fallout in the area in which the sheep could have been was well within the limits which could be toleratd . . . by sheep without any harmful effect or observable effect whatsoever.

Tr. of Oral Dec. at 11.

Later in the oral decision (p. 14) it was stated:

> I am not satisfied on the exact cause of these excessive losses. That part has bothered me a good deal. That there should be a combination of all diseases and not readily observation during the preliminary investigations and subject to diagnosis, is one of the difficult problems in this case.

ings in its published memorandum decision and entered judgment on the basis of them. The plaintiffs in the six similar lawsuits accepted the decision in the Bulloch case as dispositive of their claims and consented to their dismissal. The judgments of dismissal were never appealed.

So far as the Court was aware, no question concerning these judgments was raised until hearings of committees of the Congress in 1979 developed, tangentially to their primary inquiry concerning the effects of radiation upon humans and without questioning the propriety of the Court's 1956 judgments on the evidence before it, indications that there had been a "cover-up" by the Government at the trial of significant information concerning the effect of rdiation upon animals in the "sheep cases." These hearings led to the filings by plaintiffs of the present proceedings to set aside the prior judgments for alleged fraud upon the court.

Before considering in detail the positions of the parties in these proceedings and making findings of fact and conclusions of law on the disputed issues now presented, additional background circumstances may be useful.

While not developed in the record, the Court has accepted the suggestion of the Government that it should take judicial notice of various historical facts.

The Nevada Test Site was established on December 18, 1950, by Order of President Truman. The establishment of a continental test site for nuclear weapons occurred amid much public debate and at a time of international crises which was widely perceived as a threat to peace and to the security of the nations of the free world.

In 1947 the Soviet Union was positioning itself to fill the economic and political vacuum in war ravaged Europe. In 1948 a communist coup overthrew the government of Czechoslavakia, and the Soviet Union began to threaten

surface transportation between Berlin and West Germany. In 1949 communist forces were victorious in overrunning China. Also in 1949 the Soviet Union succeeded in detonating an atomic device, thus breaking the United States' nuclear monopoly. In 1950 hostilities broke out in Korea and American military forces were assigned to that conflict. Accordingly, the President committed the resources of the Atomic Energy Commission (AEC) to the rapid development of thermonuclear weapons.

The necessity for a continental test site was premised on the need to evaluate certain nuclear devices quickly and in close proximity to the AEC laboratories without the costs and consumption of traveling time required by use of the Pacific test range. Moreover, the conflict in Korea threatened the security of the Pacific test range, whereas the security of a continental site was insured.

The following additional background facts are established by admissions in the pleadings or by stipulation:

1. The "Upshot-Knothole" test series of eleven atmospheric nuclear tests was conducted between March 17 and June 4, 1953, at the Nevada Test Site. Two tests which contributed fallout to areas where plaintiffs' sheep were located were the 24.4-kiloton "Nancy" shot fired on a 300-foot tower on March 24, 1953, and the 32.4-kiloton "Harry" shot fired on a 300-foot water tower on May 19, 1953. At the time of these two test shots, plaintiffs' sheep were located at various sites at various times within an area from 40 miles north to 160 miles east of the test site. Of these sheep an unusually high number of ewes and lambs died during the spring of 1953.

2. Radioactive fallout from shot "Nancy" traveled in a northerly direction from the Nevada Test Site, and fallout from shot "Harry" traveled in an easterly direction from the test site.

3. Plaintiffs sued defendant on February 17, 1955, alleging that plaintiffs' sheep died as a reults of exposure to radioactive fallout from atmospheric tests at the Nevada Test Site.

4. The genesis of the action was an unsually high number of deaths of sheep which had been grazing on winter pasture in an area adjacent to the Nevada Test Site during a series of atomic tests in 1953.

5. The possibility that radioactive fallout from the tests might be a cause of the sheep deaths was raised in late spring and early summer of 1953.

6. An investigation of the sheep losses was commenced on June 5, 1953, by the U.S. Public Health Service and the AEC.

7. Based on an initial investigation, it was determined that the fallout might have been a contributing factor in the deaths. In order to arrive at more conclusive findings, however, additional scientific investigation was recommended.

8. Such investigation was conducted during most of the remainder of 1953 at primarily three locations: the Hanford Works in Richland, Washington; Los Alamos Scientific Laboratory in Los Alamos, New Mexico; and Oak Ridge National Laboratory, Oak Ridge, Tennessee.

9. A Final Report of the investigation was published by the AEC on January 6, 1954. The report was concurred in by the U.S. Public Health Service, and the U.S. Bureau of Animal Industry, and reviewed without concurrence by the Department of Health of the State of Utah. Attached to the Final Report were two related reports: A Comparative Study of Hanford and Utah Range Sheep prepared by Dr. Bustad and others for the AEC and to be distinguished from his "fetal lambs" report hereinafter referred and Comparative Study of Experimentally Produced Beta Lesions and

Skin Lesions in Utah Range Sheep (prepared by Lushbaugh and others).

10. The investigation by the AEC concluded that radiation was neither the cause nor a contributing factor to the sheep losses.

11. The report was presented by various of the scientific investigators to the press, the sheep men, and to other members of the public in an open meeting at Cedar City, Utah, on January 13, 1954.

12. From 1950 to 1954 the Hanford Laboratory conducted experiments utilizing sheep to determine the effects of concentration of I-131. Both Dr. Pearson and Dr. Trum were aware of the Hanford experiments and the published reports thereof.

13. Dr. Monroe A. Holmes, a U.S. Public Health Service Veterinarian assigned to the Utah State Department of Health, participated in initial and subsequent field investigations of the sheep deaths in early June 1953. (He is now deceased.)

14. Dr. Robert Veenstra was a United States Army Veterinarian assigned to the U.S. Naval Radiological Defense Laboratory in San Francisco, California. He participated in initial and subsequent investigations of the deaths of plaintiffs' sheep, and concluded that radiation was a contributory cause of the deaths.

15. Dr. Robert Thompsett, a small animal veterinarian in private practice at Los Alamos, New Mexico, participated in the investigation of the deaths of plaintiffs' sheep at the request of the AEC and his initial view was that radiation contributed to those deaths. (Dr. Thompsett is now deceased.)

16. During the discovery stages of the original case, plaintiffs submitted interrogatories to the United States regard-

ing the AEC investigation into the sheep losses. The interrogatories and defendant's answers were as follows:

> INTERROGATORY NO. 28: Did anyone involved in the investigation disagree with the reports?
>
> ANSWER: We are not aware of anyone who is involved in the Commission's investigation of the alleged sheep losses who now disagrees with the report issued by the AEC.
>
> INTERROGATORY NO. 29: Did anyone conclude that radioactive fallout was a possible cause of the injury to the sheep?
>
> ANSWER: We do not know of anyone connected with the AEC's investigation of the alleged sheep losses who has now concluded that radioactive fallout was a possible or probable cause of the injury.

17. At the trial, the contention was made by counsel for the plaintiffs that there had been a cover-up by the Atomic Energy Commission and that witnesses had been coerced into changing their conclusions. In response to these contentions, the Court made the following comment:

> THE COURT: That's the thing that bothers me. Now, Mr. Bushnell, if that were so, considering that also in the fallout area, without, let us say, great circumspection, anyway, advising the human beings in that area about the danger, there was fallout sufficient to cause the death of animals, and these gentlemen investigating it, in order to cover-up for the government, either knew or suspected the possibility of that extent of fallout, and those consequences to animals, involving the death of large numbers, and realizing also that not only the welfare of the people in that area but the welfare of future generations and other bodies of people in connection with other tests would be jeopardized by a false apprisal of the situation in that respect, do you want me to believe that they aren't giving

their best consideration objective opinion with reference to the effects, if any, of radiation?

MR. BUSHNELL: I do.

18. In 1979 Congress and the Department of Health, Education and Welfare conducted investigations of the health effects of low level radiation. Congressional hearings were held by Congress at Salt Lake City on April 19, 1979, in Las Vegas on April 23, 1979, and Washington, D.C., on August 1, 1979.

The plaintiffs contended and sought to prove in the present proceedings as the basis of its claim of defendant's alleged fraud upon the court that:

1. The AEC prior to 1956 had experimental evidence of the effects of radiation on fetal lambs which it concealed from the Court and from plaintiffs which showed results surprisingly similar to those suffered by the lambs of the plaintiffs.

2. The AEC acting through its representatives wrongfully pressured its own investigators and potential witnesses in the trial to change their testimony or not to testify at all.

3. The Government attorneys involved in the preparation and trial of the case either participated in or had knowledge of the intimidation of expert witnesses or the efforts made to cause said witnesses to alter their testimony.

4. The Government attorneys participated in concealing documents and data by submitting evasive, misleading and untrue answers to interrogatories.

5. The AEC falsified documents.

6. The AEC deliberately covered up and concealed the truth concerning the extent and effects of radiation upon the Cedar City sheep.

Defendant denied the plaintiffs' claims, asserted that some of them were not properly before the Court on the issue of fraud, and contended in any event that plaintiffs' claims were barred by laches and limitations. All of these contentions were explored in the present proceedings.

The plaintiffs have charged from time to time that defendant since the filing of this case has improperly secreted or withheld relevant records from them as a continuation of the alleged prior "cover-up." The defendant has asserted privilege or confidentiality with respect to some relevant documents, has delayed production of some and commingled others with a larger number of less relevant papers without the segregation plaintiffs have demanded and has failed to timely disclose its possession of a box of exhibits which were proposed or received in the original litigation. With respect to the latter subject, the sinister implications suggested by plaintiffs and initially entertained by the Court have been dispelled by reasonable explanations made by present counsel for defendant, based upon the stipulated order made by the Court in 1956 which permitted each party to withdraw its exhibits in view of the lack of any intention to appeal, and the commingling of these records with other files or boxes in the Department of Justice thus delaying their identification. With respect to discovery generally, both sides in the present litigation have been contentious but have proceeded in good faith and generally with propriety. Any failures and shortcomings have involved no more than thoughtlessness and have not substantially impeded the fair exploration and development of the evidence on the basic issue of fraud upon the court, which turns essentially on the conduct of the original Bulloch trial and its antecedents and not upon any question of discovery incident to the present action to set aside the prior judgments. The diligence, good faith, circumspection and pro-

priety of present counsel for the parties during the present proceedings are not subject to reasonable question in the opinion of the Court.

The stenographic notes of the official court reporter at the original trial were destroyed by the Clerk of Court or with his authorization in harmony with laws and the practice of the court, likely during or about the year 1979, but in any event long after the 10-year period during which such records were customarily retained. Up to that time no one had suggested that the records of the Clerk's Office pertaining to this original case were of continued importance. The first formal request by the plaintiffs to the Clerk's Office for the court's records was on May 20, 1981, but the evidence suggests that during the period of no more than a year prior to that time plaintiffs' counsel and perhaps others had informally attempted to locate the stenographic notes by inquiring of the Clerk's Office and the court reporter. No transcripts of those notes had been made except for partial evidential transcripts, transcripts of arguments, and pretrial proceedings, pretrial depositions and the oral decision of the Court, all of which have been made available for the purposes of the present proceeding and which have proved useful, but not wholly satisfactory, in reconstructing significant elements of the trial. The court's regular files of these actions were maintained and have been recovered from the archives for the purposes of these proceedings.

The discussions and evidence at the trial and during the present proceedings generally referred to the subject matter of the damages and deaths in question as "sheep" but it was and is generlly understood that such references were intended to cover "lambs" whether "fetal" or otherwise unless expressly ruled out. At the original trial and during the preceding investigations it was both germane to inquiries

concerning "sheep" and fairly called for in responses thereto, to describe the situations of both lambs and sheep.

II FINDINGS OF FACT

1. The "Upshot-Knothole" multi-shot experiment of eleven atmospheric nuclear tests was conducted between March 17 and June 4, 1953, at the Nevada Test Site. The cumulative yield (energy release) of the explosions was 252 kilotons. The two tests which contributed the greatest amounts of fallout to areas where plaintiffs' sheep were known to be grazing were the 24.4-kiloton "Nancy" shot fired on a 300-foot tower on March 24, 1953, and the 32.4-kiloton "Harry" shot fired on a 300-foot tower on May 19, 1953. At the time of these two test shots, 11,710 sheep were grazing in an area from 40 miles north to 160 miles east of the test site. Of these sheep, 1,420 lambing ewes (12.1%) and 2,970 new lambs (25.4%) died during the spring and summer of 1953.

2. After studying the conditions surrounding these deaths the AEC reported as before noted that there had been no causal connetcion between the sheep's exposure to radioactive fallout emitted during the "Up-shot-Knothole" test series and their deaths. The Commission's formal conclusions, released on January 6, 1954, were introduced by the following press statement:

> On the basis of information now available, it is evident that radioactivity from atomic tests was not responsible for deaths and illness among sheep in areas adjacent to the Nevada Proving Grounds last Spring, the U.S. Atomic Energy Commission reported today.
>
> The AEC findings, reached as the result of extensive research studies, was concurred in by the U.S. Public Health Service and the Bureau of Animal Industry, U.S. Department of Agriculture. Prior

to issuance by the AEC, the report was reviewed by the Department of Health, State of Utah. Special studies were conducted by veterinary and medical research scientists at Los Alamos Scientific Laboratory and Hanford Works and the University of Tennessee to determine whether radioactivity contributed to the deaths.

3. The final report was concurred in by the U.S. Public Health Service, and the U.S. Bureau of Animal Industry, and reviewed by the Department of Health of the State of Utah without concurrence, and there is reason to believe that certain participating representatives of the Public Health Service had serious misgivings about the conclusions of the report. The published report concluded that radiation was neither the cause of nor a contributing factor to the sheep losses. The report was presented by various scientific investigators to the press, to the sheepmen, and to other members of the public in an open meeting at Cedar City, Utah, on January 13, 1954.

4. At or within a few months after this public hearing it was apprehended by representatives of the AEC and could reasonably be foreseen by the Commission that the sheep owners suffering the excessive losses in question might bring legal action against the United States. It is reasonable to infer from the evidence, and the Court finds, that from no later than a few months after this public hearing, among the objectives of some representatives of the AEC in making further investigation and releasing further information were the dissuasion of lawsuits against the Government and, if such lawsuits were filed, to increase the likelihood of the Government's winning them in view of the perceived importance to the country of the continuation of atmospheric testing without obstruction by public opinion or judicial action.

5. The defendant's preparation of the defense of the case included visits and interviews with persons involved with

the initial and ensuing investigations by the governmental and other agencies into the cause of the death of the sheep. The persons visited and interviewed included persons who felt radiation was or could be a contributing cause of the sheep deaths as well as persons who concluded that it was not.

6. Among the first investigators to arrive in the Cedar City area were four veterinarians: Dr. Arthur Wolff, U.S. Public Health Service; Dr. Monroe Holmes, U.S. Public Health Service; Dr. R. E. Thompsett, contracted by the AEC to operate a pet hospital at Los Alamos; and Dr. Robert Veenstra, U.S. Army, Veterinary Corps. Later investigations were made at the request of the AEC by Dr. Rust, Veterinary Corps, U.S. Army, Dr. Comar, Professor of Biochemistry, University of Tennessee, and Dr. Trum, U.S. Army Veterinary Corps. By the time the first investigators arrived in Cedar City, the carcasses of plaintiffs' dead sheep had been destroyed. Consequently, investigators examined a limited number of surviving sheep selected by one of the plainitffs as showing surface symptoms similar to those which had been suffered by the dead sheep.

7. In view of the random and largely unreconstructible nature of fallout distributions and sheep grazing patterns, there was no assurance that if the dead sheep had suffered radiation injury or resulting death any particular surviving members of the same herds would exhibit radiation injury. There were "hot spots" in which radiation was many times as intense as in adjacent areas, and there is no uniform dispersal of sheep in a given herd. There is testimony tending to show that some sheep were in areas of inordinately high concentrations of fallout. The radiation doses or levels in particular areas in view of variables that have to be assumed in any dose computations render it impossible to say with any degree of certainty on the basis of objective evidence that radiation damage did not cause or contribute to the

deaths of the sheep in question irrespective of circumstantial evidence to the contrary.

8. In 1979 Congress and the United States Department of Health, Education and Welfare conducted independent investigations into the health effects of the Nevada nuclear tests of the 1950's and the 1960's. In connection with public hearings several previously classified documents and reports were released. Testimony before the Committees tended to show that the sheep in question were in areas of above normal radioactive fallout with reference to the "Nancy" shot on March 24 and the "Harry" shot on May 19, 1953; that the AEC did not have definite information as to the amount of actual radioactive fallout to which the sheep were exposed; that government records were changed to discount evidence of a causal relationship between radiation exposure of the sheep and their deaths; that without adequate justification the AEC disregarded or discounted clinical information supportive of a conclusion that radiation was the cause of death; that the AEC had evidence which substantiated the fact that the dead sheep had received considerably more radiation than the amounts expressed in the AEC reports; that there were differences of opinion as to whether the experimentally produced lesions were comparable to those observed on the Cedar City sheep; and that the final report of the AEC was falsely presented as representing the unanimous view of those who participated in the investigation and signed the report.

9. On the basis of the 1979 hearings the plaintiffs made further investigation leading to the commencement of the present proceedings on February 25, 1981, to vacate the 1956 judgments for fraud on the court. *Radiation Exposure as the Cause of Sheep Injury; "Fetal Lambs."*

10. The defendant's representatives contended and testified at the original trial, and the Court accepted their

position, that plaintiffs' sheep herds could not have been exposed to radiation in excess of 5r which was wholly insufficient to cause injury to plaintiffs' sheep. Neither the defendant nor its representatives had such positive knowledge. When the radiation maps were being created prior to the trial upon which the AEC was to rely the figures were adjusted or juggled in such a way as to throw doubt upon their accuracy.[5] In an official AEC staff report (604/3 Nov. 4, 1953), by the Director of Biology and medicine, Dr. Paul Pearson, it was reported that the infinite gamma dosage where the sheep were located "would not exceed 5 roentgens." In that same report information was given which when placed in its true context would indicate that exposure was in the range of 30 to 100 roentgens and possibly higher. In paragraph 12 of the staff report, the statement was made that readings on the backs of sheep (surviving

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[5] For example, it has now been revealed that in the course of the creation of these maps the following comments were made by some of those responsible:

> The 10r spot on our map should be changed to 5r to be consistent with page 504 of the report. Actually, we have readings to confirm either figure, but I, personally take the lower as being more reliable.
>
> • • •
>
> Although I have but one reading taken more than two weeks after this shot to back up my contention, I feel that the area immediately adjacent to the eastern boundary of the NPG had activity about five times that indicated. This comes from a comparison with shot 7 and also from the burns on the horses which would require more dose than indicated.
>
> • • •
>
> It appears that it would be helpful if a map drawn by Commander Johnson . . . could be compared with Johnson of the Los Alamos Scientific Laboratories. Since these gentlemen do not seem to agree on the fallout areas it is important that we establish which of them presents the official position the Government is to take in this regard.

sheep) were "up to 2 and 4 mr per hour." The statement omitted the fact that this reading was made 26 days after exposure.

11. Commencing in 1949, and continuing to the time of the original trial, extensive experimentation had been conducted at Hanford, Washington, by General Electric Corporation, for the Atomic Energy Commission, with reference to the effects of radioactive iodine on sheep. Some of that experimentation pertaining to the effect upon fetal lambs had been completed by 1952. The results of this experimentation were known by the AEC, and more specifically to Dr. Paul Pearson and his associates in the Department of Biology and Medicine and to Col. Trum at the Atomic Experiment facilities in Oak Ridge, Tennessee. Such information was not discussed with or revealed to the plaintiffs and the court before or at the trial. To the contrary, the representation was made by Dr. Bustad, who conducted the experimentation that "the Utah sheep showed no evidence of the radiation damage observed in experimentally treated sheep." A complete report concerning the results of this experimentation was not published by Dr. Bustad until 1957. The experimentally treated sheep had in fact developed signs and conditions almost identical in appearance to those observed in plaintiffs' sheep, particularly with reference to the new-born.

12. Dr. Monroe A. Holmes, a U.S. Public Health Service veterinarian assigned to the Utah State Department of Health, was a member of the Government team that conducted the first field investigation of the sheep deaths in early June 1953. He gave the following description of the affected sheep as it pertained to the condition and symptoms of the new-born lambs:

> Majority of the lambs were born dead in a stunted condition. Ewes died either during lambing or within a few days after. Stunted lambs were con-

> sidered to be full-term, completely and well-formed—no disfigurements nor monstrosities, but were of approximately one-half normal birth size. These were not aborted lambs, being delivered after full gestation period. Lambs that lived would survive up to 5 or 6 days. They were weak in appearance and action, and, upon lying down, would have difficulty in getting up or standing. A few tried to nurse, but were unable to do so because the ewe apparently had little or no milk. Attempts were made to hand-feed some of these lambs, but, due to the great number involved, it became an impossible task and deaths occurred too quickly to ascertain whether or not hand-feeding was feasible. (T4-3.)

13. In the undisclosed 1952 report of Dr. Bustad as to the effects of radioactive iodine on pregnant ewes and newborn lambs, the following information was given:

> At birth, only one of six lambs born to the ewes fed 135 uc/day was able to stand and nurse unassisted. The others were weak, showed a stupid and lethargic attitude with drooping ears and a depressed head. Two of the lambs died before they were two days old and a third one was sacrificed since it was too weak to stand.
>
> The six remaining ewes in the group previously fed 240 uc/day for 450 days (April 1950 to July 1951) gave birth to nine lambs. Four of these lambs were stillborn. The remaining five were normal in appearance but were smaller, showing a mean birth weight of 2 kg compared with an average of over 4 kg in other groups. Since the dams of these lambs produced insufficient milk to sustain their offspring only two animals were retained beyond one month. These two animals, maintained on a supplement of evaporated milk, developed normally. (T4-19, T22-14, 16.)

14. The similarities between the effects of radiation on Bustad's laboratory lambs and the symptoms Holmes noted

in the Utah lambs are impressive as the following summary demonstrates:

Bustad's Hanford Observations	Holmes' 1953 Observations
1. Of nine lambs born to ewes fed 240 uc/day for 450 days, "four were stillborn."	"[The] majority of lambs were born dead in a stunted condition."
2. "The remaining five were normal in appearance but were smaller, showing a mean birth weight of 2 kg compared with average of over 4 kg in other groups."	"Stunted lambs were considered to be full-term completely and well-formed . . . but were of approximately one-half normal birth size."
3. "At birth, only one of six lambs born was able to stand and nurse unassisted."	"A few tried to nurse, but were unable to do so because of weakness."
4. "The dams of these lambs produced insufficient milk to maintain their offspring."	"The ewe[s] apparently had little or no milk."
5. "The others were weak, showed a stupid and lethargic attitude with drooping ears and a depressed head."	"They were weak in appearance and action."
6. "A third one was sacrificed because it was too weak to stand."	"Upon lying down, [they] would have difficulty in getting up or standing."

15. Bustad's experiments further demonstrated that conditions resembling those observed in plaintiffs' fetal lambs were found whether exposure to radioactive iodine occurred during the entire gestation period, the last half of gestation, the last trimester of pregnancy, or for only two months while the fetus was in utero; also that such symptoms were observed as to all the fetal lambs of ewes fed 1800, 240 or 135 microcuries of iodine per day. Bustad further observed that "concentrations of I-131 in the fetal thyroid may be two to three times that of the dams in advanced pregnancy."

16. No one now denies that the foregoing evidence was important for investigation by plaintiffs and consideration

by the Court in connection with other evidence concerning the causal connection between radiation and sheep injury. Dr. Bustad himself so concedes but attempts to explain its omission from discussion in the reports made available to the plaintiffs and the Court on the grounds that his reports were made merely for the information of the AEC which already had his fetal lamb report, and that the latter was cited in footnotes in the reports released to the sheepmen and to the public. The Court finds these explanations insufficient. The AEC and its representatives preparing for the defense of the original actions had all reports and knew the significance of Dr. Bustad's fetal lamb report. Whether Dr. Bustad intentionally buried it in footnote references in his released reports as a ploy is beside the point. It was buried, and those managing the Government's investigation without commenting on the suppressed report submitted others to a different effect with their final report, and in connection therewith reiterated the statement that Bustad included in his addendum report that "the Utah sheep showed no evidence of radiation damages observed in experimentally treated sheep."

17. Dr. Bustad further attempted to defend the absence of discussion of the fetal lamb report in the released material on the ground that he was assigned by the AEC to address only the issue of radiation effects on "premature lambing." Such an explanation raises even more far-reaching questions. A summary of losses to plaintiffs' sheep showed only about 20 premature lambs and in excess of 2300 lambs dying after a normal gestation period. Premature lambing was not the real problem. Any direction of Dr. Bustad's efforts exclusively to that comparatively trivial aspect of the lamb problem could suggest an even more devious and sophisticated plan of concealment.

18. Defendant seeks to discredit the weight of the fetal lamb report on the claim that plaintiffs have made an

erroneous comparison between the plaintiffs' sheep and the sheep involved in the controlled experiments without taking into account quantity variations of radioactive iodine to which the respective ewes were subjected. The validity of such a contention is far from clear on the present record and some of Dr. Bustad's own figures render it questionable. But the Court need not – indeed should not – at this stage and on the basis of only a partial record determine the weight of the concealed evidence in connection with all of the other evidence on the merits. Suffice it to find, as I do, that the evidence wrongfully withheld at the trial, including the fetal lamb report, was of substantial significance and weight in favor of plaintiffs' claims for damages and was essential to a fair and proper consideration of the merits of those claims by the Court. Government counsel's contention now that "the similarity between the Hanford experimental lambs and the plaintiffs' sheep is purely coincidental" must be rejected on the present record. That point in fairness and in the interest of justice on the present showing must be reserved for retrial on the merits when the fact finder in view of other evidence heretofore concealed can reweigh the earlier claim of "mere coincidence," *i.e.*, that the unprecedented injuries and deaths suffered by plaintiffs' sheep during the period and in the vicinity of atomic bomb testing in Nevada was a "mere coincidence" ascribable only to malnutrition, drought and disease operating independently of radiation.

19. Nor can the Court accept Dr. Trum's explanation that the missing report would have confused the Court, or suggestions that experts may have had the right to relegate the Court in some respects to "objective" evidence person-

ally observed by himself and his associates as distinguished from circumstantial evidence.[6]

Witness Pressure

20. Dr. Robert Veenstra was used by the Atomic Energy Commission to observe and investigate the effects of radiation on animals at other atomic test sites. He was on the first field investigation team assigned by the Commission to examine the alleged losses to the Cedar City sheep. He submitted the following conclusion in June 1953:

> In view of hyperplasia, presence of detectable gamma radiation in the bone marrow, skin lesions, possibility of toxins due to the lesions and the presence of pregnancy in many ewes it is my opinion that radiation was at least a contributing factor to the loss of these animals.

21. Evidence unrevealed at the time of the original trial shows that on October 19, 1953, Dr. Pearson wrote to Dr. Veenstra in an attempt to change his opinion by citing some recent AEC calculations of thyroid dosages. Pearson urged Veenstra to review the data and then report back "as to whether or not in view of these data you [still] feel that radiation was a contributing factor . . . ." On December 23,

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[6] Concerning the desirability of the Court's having had the benefit of the fetal lamb report he testified among other things:

> Dr. Trum: Your Honor, I think it would have been very confusing.
>
> Q: (the Court): You think it would have confused the court to have that similarity pointed out?
>
> A: It would have confused everybody, because they were not related.

Dr. Trum further explained that he, Dr. Rust and Dr. Comar were directing the investigation and that they acted only to obtain results indicated by "objective" criteria. "You see, in the first place, everything we were trying to keep in mind was objective. We did not see lambs. We heard no indication that there was pregestational radiation."

1953, Dr. Veenstra mailed his response to Pearson in which he stated:

> The impression seems to exist that I based my opinion regarding the Utah and Nevada livestock problem entirely on the findings of I-131 in the thyroids. This is not the case.
>
> As you know, we found radiation present in the kidney, spleen, rib and liver as well as in the thyroid. We also know the animals were in poor physical condition and that many were pregnant. In addition, the presence of lesions and their type and location on the animals must not be overlooked.
>
> It was this combination of circumstances that caused me to form the opinion that I did.

22. Dr. Bernard Trum acted as liaison for the defendant and its attorneys in preparing to defend against plaintiffs' claims. Recently revealed evidence discloses that Dr. Trum wrote to Dr. Veenstra in March 1955:

> The scoop is that the ranchers are about to start suing the government for those 1953 losses. If they do there isn't any way we can keep from getting involved. In the last report I had a chance to see that you rendered, I got the distinct feeling that you felt that there was a chance that radiation could have caused the death of some of the sheep at least. In the iterim substantial work has been done which may have caused you to change you're [sic] mind.

Dr. Trum then furnished data on claimed radiation dosage and concluded:

> Because you didn't have this information available when you were asked to make your statement I've been wondering if you might not have changed your mind about these things. If you haven't changed your mind I'd like to know what you are

> basing your opinion on for I shouldn't like to go into this thing divided within our own Corps if we can avoid it. Hope to hear from you soon.

Before Dr. Veensetra could submit a written reply to Dr. Trum, the latter paid a personal visit to Veenstra in San Francisco. Over the course of three hours, Trum and Veenstra exchanged views and Trum later recorded Veenstra's reaction:

> April 2, 1955 — San Francisco, California
>
> Visited Lt. Col. Robert J. Veenstra, Bio & Med Sciences, Code 3-921A, USDL, San Francisco 24, California (4/1/55). At our request he invited Dr. Charles Sondhaus of the laboratory to meet with us. It was their opinion that several factors, had not been satisfactorily explained in the investigation of sheep deaths following the Spring Series 1953 tests at the Nevada Test Site.
> It was their opinion that the independent studies of Lushbaugh at Los Alamos and of Kornberg and Bustad at Hanford were not conclusive inasmuch as they dealt with only isolated actions of a beta emitter on the skin and a dose or doses of iodine-131. The accumulated effects of the total fission product spectrum was not adequtely considered. In addition, it was felt, particularly by Sondhaus, that the AEC had placed too much stress on the document by Dunning (Compilations of Radiation Dose to thyroid, etc.) estimating dose received.

23. A few days after this visit (April 7, 1955), in a letter addressed to Trum. Veenstra again defended his position:

> We feel that our position has not been materially changed; basically we are still of the opinion that radiation could have contributed to the deaths of the animals.

He then reveiewed his reservations concerning government experiments: The Hanford tests "were on healthy sheep"

while the Nevada sheep were in poor condition; the Los Alamos study dealt only with "irrelevant" external burns that he never claimed were a cause of death, only an indication of exposure; and "thyroid doses could have reached a level several times that originally calculated." At the top of this letter is the statement: "This letter was not sent — has not been published and is confidential to the department." The letter, dated April 7, 1955, was hand delivered to John J. Finn, U.S. Trial attorney, when he personally met with Veenstra in San Francisco.[7] Veenstra testified at

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[7] The "unpublished letter" by Veenstra was a strong refutation of the position of the AEC. The letter is as follows:

(This letter was not sent – has not been published and is confidential to the Department)

7 Apr 1955
3 921A
RJV.jh

Lt. Colonel Bernard F. Trum, CC
UT AEC, Box 142
Oak Ridge, Tennessee
Dear Colonel Trum:

In reference to your letter of 25 March we are submitting a file for your information. We feel that our position has not been materially changed: basically we are still of the opinion that radiation could have contributed to the deaths of the animals. Although it is of course difficult to decide what degree of damage would have followed from a given exposure of this type, we are aware of the additional studies that have been carried out and we are convinced of their validity, but not completely of their relevance.

The following points merit considerations:

a. The Hanford studies have indeed shown that very high doses are required to produce thyroid disfunction that will lead to mortality in sheep. However, we feel that in Nevada sheep, thyroid damage was certainly not the most important radiation induced injury. At the time of the injury iodine 131 constitute only 0.1 per cent of the total fission product activity ingested (see Hunter, Ballou), and

at the original trial that in his judgment there was a causal connection between radiation and injury to the sheep. It seems likely, however, that the Trum pressure chilled the maintenance of his opinion and that the Government's answers to interrogatories and other circumstances hereinafter mentioned diverted plaintiffs' counsel from a searching exploration of his views for fear of having the ground cut from under his case by complete neutralization of the initial reports favorable to plaintiffs' claims.

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other elements are retained to a degree sufficient to be of importance here.

b. The Hanford experiments were on healthy sheep subject to no other deleterious influences. With the Nevada sheep there was not only further internal radiation but the animals were also observed to be in poor condition and suffering from malnutrition, "disease," exposure and whatever other hardships existed with range animals.

c. In reference to the Los Alamos study on Beta skin lesions, we feel that whether or not the Nevada sheep were externally burned is largely irrelevant to the question of mortality. The presence of beta burns on the Nevada sheep were considered by us to be significant only as an additional indication of exposure and not as a potential cause of death.

d. In regard to the blood cell level report both RBC and WBC were low (see enclosure). This might indicate radiation exposure but certainly is not specifically diagnostic.

e. We agree with you that the external gamma dose is negligible and does not enter into the question.

f. One cannot safely conclude that the doses to the thyroid were as low as the original estimates indicated. According to our calculations, the thyroid doses could have reached a level several times that originally calculated. (Sondhaus calculations) Also, though the activity found in the thyroid serves as an index of total radiation exposure, the thyroid dose is but one of several possible types of internal radiation which will occur when ingestion of mixed fission products has taken place. The most important of

On the same day the unpublished letter was written and despite Veenstra's statement that he would like to see the experiments referred to by Trum before taking an official position, Veenstra wrote a handwritten letter abdicating his long-time and forcefully defended his position that radiation was a contributing cause. The Court finds in such strange and tortuous behavior together with surrounding circumstances recounted hereafter further indication of unacceptable pressure placed by the Government upon witnesses adverse to its position, deceitful conduct beyond acceptable discussions among scientific colleagues preparing to reflect their own views in court, and an undermining of the processes of the court as an institution. While Veenstra did appear at the trial and expressed his continued opinion that radiation was or may have been a contributing cause of the

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these appears to be the dose to the bone marrow from long lived isotopes with slow biological turnover. This effect has generally been considered to be chronic in character, but it appears possible that "short term" effects may also occur if concentrations are sufficiently high and the emitters are of moderately long half-life.

In particular Sr 89, Ba140, Ia140, and other elements may have been deposited in the bones in significant amounts, contributng to the total radiation effects. Unfortunately very few samples of either bone or tissue were ever either radiochemically analyzed or examined pathologically to check this.

In reference to this point the analysis of bone samples reported in the AEC report (6 Jan 1954) stated that practically all of the beta activity in the bones was due to Sr90 Y90. We feel Sr90 to be relatively unimportant at this time; its presence should imply 100 fold greater concentration of Sr89, for instance, to say nothing of other fission products necessarily present in the animal on the basis of the Hunter, Ballou and Hamilton data.

Based on the very limited data available to us at the time the above calculations were made we feel that the

damage to the sheep, his testimony was not impressive and discounted his status as an expert according to the Court's present recollection. Unfortunately a transcript or notes of that testimony are not now available for reasons mentioned earlier.

24. Dr. Trum wrote to Llewellyn Thomas, Assistant United States Attorney who was working on the defense of the case, on May 12, 1955, that Veenstra and Thompsett "will definitely state that they do not have evidence that radiation injury was either the cause or contributed to the death of the sheep" and that they would disqualify themselves. Whether Dr. Veenstra in effect did so in his testimony cannot now be determined with certainty.

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question of radiation injury was still an open one. However, on 1 April 1955 Lieutenant Colonel B. Trum and Major C. Kuhn during their visit to the laboratory informed us of the existence of a large experimental program done by them at the Oak Ridge Laboratories. We were at no time informed of the existence of such an experimental program prior to the above discussion with Lieutenant Colonel Trum. They conclude from their histopathological and radiochemical studies that the internal radiation hazard could not possibly have contributed to the mortality in the Nevada sheep. Since their conclusions are supposelly based on large numbers of actual samples collected in the field we must conclude that their evaluation of the situation is a more realistic one than ours, which is based on only a very few samples and theoretical calculations.

If we are called upon to make an official statement we feel that it would be necessary for us to see the data of the Oak Ridge group, and to dismiss [sic discuss] the actual experimental situation and technics [sic] involved.

Sincerely yours,

R. J. Veenstra
Lt. Colonel, V.C.

25. Thompsett was also one of the members of the first investigating team and he too concluded that radiation was a contributing cause of the death of the sheep. Prior to the trial pressure was brought upon him by Dr. Trum to recant his original conclusions. Attached to a letter dated May 9, 1955, Dr. Trum sent to Thompsett a proposed "model" letter in which Trum set forth the form in which he thought Thompsett should change his original conclusions. The transmittal letter stated in part:

> Dear Bob [Thompsett]:
> Enclosed find model letter and documents . . . . The letter is addressed to Woodruff . . . . Send one to Pearson too if you want to because he's interested. If the letter is not exactly to your liking or not your style, you make the changes as you see fit. (App. 16, T16-1.)

The model letter, which Thompsett later signed with minor changes included the following statements:

> . . . I did make a personal report to Mr. R. E. Cole of the AEC, Albuquerque, New Mexico. I believe I informed Dr. Pearson and perhaps your office of this report. The report pointed out that, due to the presence of radioactivity in the affected Utah sheep, the history of fallout in the locale, the lesions on the face which resembled beta-burns and the epizoological aspects of the syndrome and deaths which could not be explained by veterinarians experienced in sheep practice, I was of the opinion that radiation caused the deaths of sheep or at least contributed to them and due to the presence of affected horses and cattle too, the situation appeared to me to be very serious.
> Subsequently I've re-evaluated my position as more information became available.
> . . . .
> I believe it is reasonable to assume sheep could tolerate with impunity the maximum radiation dose possible under the range condition in 1953.

> In conclusion, let me say my opinion, as of now, is in agreement with the statement of AEC and US DPH released at Salt Lake City, January 12, 1954.

26. The contents of the model letter was in marked contrast to another undated letter in which Dr. Thompsett had expressed opposite views.

27. The undated letter written by Thompsett in part stated:

> . . . However, lesions were taken from several sheep and also from the dorsal surfaces of the horses owned by the Stewart family. Examination of the these lesions leaves little doubt in the mind of the undersigned as to their origin. The typical keratic appearance was the same as in the "Trinity" lesion of cattle injured at Trinity and a former Las Vegas accident. Discoloration of the hair in the lesions from the horses was typical of the "Trinity" lesion. However, the lesions that were taken only showed a four percent (4%) of grey hair. Possibly this may increase or decrease in time.
>
> . . . .
>
> Again with the sheep losses I am of the opinion that the Atomic Energy Commission has contributed to great losses. I would again like to state that my report is only a matter of individual opinion. First, there is no doubt as to the origin of the lesions on the sheep. The lesions are absolutely typical of the Trinity lesion both microscopically and in the laboratory. The reasons for death in the sheep are multiple. The ovine as a species is not a hardy animal. The long trip from the Nevada grazing area to [illegible] headquarters in Utah added to their debility. Pregnancy in any animal is an added burden and the greatest percentage of these animals were young ewes. Couple these factors to a heavy strain at shearing time I am of the opinion that the lesions from radioactive burns caused pseudo-autotoxemia.

A thorough study of sheep diseases as well as a survey of endemic diseases at this time makes the syndrome of our sheep sickness aim toward a diagnosis of radio-activity damage. It is very interesting to note that one sheep owner had moved his animals from the Nevada Test area in February, (prior to the test), and he evidenced none of his animals with similar symptoms. My theory as to the type and locality of the lesions found in the sheep is based on the eating habits of sheep. I believe that the sheep came in contact with radioactive dust from the plants in this area. The face, mouth nose and ears of the sheep have the least wool covering thus the intensive of damage to these areas. The heavy lipid covering on the sheep's body would have a tendency to "hold" particles of radioactive dust to these parts.

As to the number of animals or the amount of indemnity these sheep owners should be credited for their losses, a more detailed study must be made. I am however positive that the "Wintering" area of all animals should be a greater distance from the test fall-out area.

R. E. Thompsett DVM
Project Veterinarian.

28. Dr. Trum had the notion that the "objective" evidence he had assembled based largely upon scientific examinations and appraisals of the tissues from surviving sheep should be controlling on the issue of causation at the trial and that to have injected into the trial contrary or circumstantial evidence was to be avoided to the extent reasonably possible.[6] I find his efforts to that end were unjustified, im-

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[6] Q. (By the Court): You've told us that you didn't give a damn about what Thompsett thought, and you've told us that he wasn't — almost — that he was entitled to have anyone pay attention to him, and now you say you were hoping that he would disqualify himself.

proper and incompatible with the judicial process, and yet to have been to a substantial degree effective in withholding from the Court or weakening evidence which the Court should have been permitted to consider on its own merits in connection with other evidence in the case.

Answers to Interrogatories

29. During the discovery stages of the case, plaintiffs submitted interrogatories to the United States regarding the AEC investigation. Defendant's answers to them were initially drafted by Don Fowler, Charles Eason, or Mr. King, attorneys for the AEC, reviewed by all of those together

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The first point is: Is that so? Were you hoping . . . that he would disqualify himself? And the second point: If you were hoping, why were you hoping that?

A. Now, I was really hoping that we would have little trouble having to prove every point of the errors that we knew was wrong, and that if in certain areas, for example both Thompsett and Veenstra were right about the cattle and the horses, we would not have to go into that. But now when it came to the sheep, if we had to go into every one of them, then we would have to go and argue all the facts – that we had been putting before – all out again. And there's certain of those things – for example, neither were qualified to look at a slide and tell what the expert testimony was there to do.

Q. So it's simply to save trouble at trial to have you go into these things?

A. Not only save the trouble, your Honor, but to save those little things that come into making professional people look kind of bad, you know.

Q. You were hoping to save Thompsett from embarrassment?

A. Embarrassment and – and disagreement.

Q. And that's what you meant when you said you were hoping that Thompsett would disqualify himself?

A. That's the context of that.

Q. I think you also indicated that you were hoping his testimony wouldn't complicate the trial, which you thought would be for no purpose. Is that a fair statement?

A. It's a fair statement.

with Mr. Finn, Dr. Pearson, Dr. Graves, likely by Dr. Trum and Mr. Thomas, Assistant United States Attorney, and filed by the latter with the Court. Among the interrogatories and answers were these:

> Interrogatory No. 28: Did anyone involved in the investigation disagree with the report? [AEC report denying causal connection between radiation on sheep injury.]
>
> Answer: We are not aware of anyone who is involved in the Commission's investigation of the alleged sheep losses who now disagrees with the report issued by the AEC.
>
> Interrogatory No. 29: Did anyone conclude that radioactive fallout was a possible cause of the injury to the sheep?
>
> Answer: We do not know of anyone connected with the AEC's investigation of the alleged sheep losses who has now concluded that radioactive fallout was a possible or probable cause of the injury to the sheep. (T18-4.)

30. Both answers were evasive in that the questions were phrased generally in the past tense and the answers were pointedly limited to disagreements as of the time of the answers. Such calculated answers were not an inadvertence, but rather an intentional evasiveness. Not only were they unresponsive to the questions asked but the answers themselves were untrue.

31. In a recent affidavit Dr. Veenstra indicates that he never changed his opinion that radiation may have been a contributing cause. Dr. Trum, in a deposition and at the trial of the present action, admitted with some equivocation that as far as he knew Veenstra never changed his position to this effect. There are strong indications in the record that Dr. Thompsett did not actually change his original position despite his deposition testimony and letter to the contrary.

The proceedings with respect to the deposition throw further light upon what was going on behind the scenes.

32. Dr. Thompsett was not called as a witness by either side. Why this was so, why the attorneys for plaintiffs were unwilling to call him and why Government counsel did not want him to appear at the trial, become clearer as the model letter is followed into Thompsett's pretrial deposition taken on March 14, 1956, at the Los Alamos Veterinary Hospital at Los Alamos, New Mexico. The deposition according to the reporter's notation was taken "on behalf of the plaintiffs" but their counsel in lieu of the deposition tried unsuccessfully at the outset to negotiate a definite agreement for the production of Dr. Thompsett in Salt Lake City at the time of the trial and, failing this, limited his direct examination to brief authentication of Thompsett's initial report supporting plaintiffs' position. Having done so, and obviously not wishing to make the witness his own on any other matter, plaintiffs' counsel announced that he did not want to continue with the deposition at that time because of the difficulty he had experienced in getting to talk to the witness. Thereupon, Mr. Finn, over the objection of plaintiffs' counsel, had Thompsett identify the later letter as it had been signed by the witness under date of May 23, 1955, and addressed to AEC attorney Chalmer King, a friend of the witness. It no doubt was upon the basis of this deposition and the two letters that were attached to it that the Court was led to the assumption at the trial that Dr. Thompsett in good faith had renounced his original views.

33. The answers to interrogatories in question may not have been prejudicially misleading to plaintiffs in the sense that they avoided answering whether any of the experts had ever believed that radiation was the cause of the injuries to the sheep for the reason that plaintiffs knew already that at least three of them initially held that opinion. A responsive

answer may have highlighted favorable aspects of the views of Dr. Wolff which were not pursued at the trial as hereafter noted. The answers were highly deceptive in that they led plaintiffs to believe that those on whom reliance had been placed for making out a prima facie case had now changed their minds in unanimous support of the views of the defendant and discouraged the exploration in depth by plaintiffs of their original opinions by inducing apprehension on the part of plaintiffs' counsel that this would only emphasize the adverse effect of the changed opinions.

34. Both Dr. Holmes and Dr. Wolff had indicated prior to the original trial their views that there was or may have been a causal connection between the fallout and sheep deaths. Dr. Holmes had been maneuvered into the appearance of having concurred in the AEC report of October 1953 to the contrary but thereafter disassociated himself from full concurrence by an internal report within the Public Health Service. He supported the Government's contentions on causation at the trial. Dr. Wolff at all times has been inclined to the view that a causal connection could not be ruled out and so indicated to the Congressionl committee. He testified with reference to these matters in the present proceedings as a witness first called by the Court, neither side being inclined to call him as its own witness.[9]

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[9] Dr. Wolff stated in his letter to the committee among other things:

> In my view the judge's decision, in a legal sense was correct; there was no strong case that radiation was a causal factor. However, I was never convinced that radiation was not causally involved in view of the circumstantial evidence and the lack of any convincing alternative explanation of etiology.

He testified in the present proceedings:

> Q. (by the Court) . . .The letter that's been handed me is dated August 20, 1980, and to Mr. Mark J. Rabb,

Other Claims of Fraud on Court

35. At the 1956 trial the Court was advised by defendant's representatives, and the expert testimony submitted was with little divergence to the effect that, based upon reliable objective data the knowledgeable experts were unanimous in their opinion that radioactive fallout in no way could have been a contributing cause of any of the sheep losses claimed by the plaintiffs. From the evidence and information now before the Court, it is obvious that such representations were in fact not well founded. Implicit in the position taken by the Atomic Energy Commission at the trial was the representation that its investigation and reporting had been fair, impartial and comprehensive. Such was not the case.

36. Recent reassessments of the internal radiation doses plaintiffs' sheep could have suffered without reference to circumstantial evidence were reported by Dr. Anspaugh of Lawrence Livermore Laboratory, and by Dr. Murphy of Batelle Memorial Institute. The conclusions of both tended to support the position taken by the defendant at the trial as to the limited amount of radiation to which the sheep could have been subjected. Neither undertook to deal with

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Chief Counsel, Staff Director of the Subcommittee [Exhibit 20]. Is that the letter you last referred to?

A. Yes....

Q. And the summary read into the record by Mr. Bushnell represented your views as of that time within the perimeter of the socpe of that letter; is that correct?...

A. Yes, sir.

Q. And does it represent within the scope of that letter your present views?...

A. Yes, sir.

Q. Then I pass in point of time back to the time of trial. Do you recall having testified at the trial?

A. Yes, I do, very clearly.

the ultimate issue of cause and effect. The values used in these assessments were various recorded measurements of radiation taken in 1953 in the areas where plaintiffs' sheep were reported to have been trailing and grazing. The values differed substantially from those used and testified to by Dr. Harold Knapp, a former operation analyst in the office of the General Manager of the AEC and an expert of impressive credentials and experience, who had undertaken for the purposes of the Congressional committe a similar reassessment. He questioned basic assumptions of Dr. Anspaugh and Dr. Murphy and concluded on the basis of all available data that there was clearly a causal connection between radioactive fallout and the deaths of plaintiffs' sheep and that circumstances which he reviewed suggested a sophisticated suppression or muting in the course of the AEC's investigation of evidence to this effect. While Drs. Anspaugh and Murphy did not dispute Dr. Knapp's general dosage theory or his calculations (formula), nor address the question of suppression, they did question his assumptions (values), and, consequently, his conclusions as to probable dosages, as Dr. Knapp disputed theirs.

Q. Did you express the same view at the time of trial?

A. I do not believe so. I don't believe I was asked my view in that regard because my testimony dealt specifically with the data that I collected on the analysis of tissues for radioactivity, which turned out to be very specifically related to the Shot Harry.

Q. As far as you recall, you were neither asked nor did you express an opinion as to whether there might be some causal connection between the testing and the injury, the sheep involved in that act.

A. To the best of my recollection that is so, your Honor.

Q. Apart from evaluating my decision by inference in the statement quoted, did you entertain essentially as

37. The dosage studies utilize various and debatable assumptions which materially affect the validity of the respective studies and conclusions that might be based thereon. A weighing of this evidence will be more germane to a retrial of the merits of plaintiffs' case when all of the pertinent evidence can be placed before a court. It is believed inappropriate to express at this time an opinion on how the ultimate merits of the actions should be decided upon any such retrial, and I do not intend to do so. On the issues before me now, however, I find that on the basis of information within the knowledge of the defendant at the time of the original trial it could not have been fairly represented to the Court that injury to at least some substantial number of plaintiffs' sheep could not have been caused by radiation, and that all of the determinative evidence which should been placed before the Court at the original trial was not made available to it by reason of the improper conduct of the defendant as herein found.

Attorneys' Involvement

38. The answers to interrogatories prepared by defendant's attorneys were intentionally evasive and prejudicially misleading as heretofore found. The Court finds that at least one, if not more of the defendant's lawyers was a party to an intentional deception in this respect.

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of that time of the trial the same impression you expressed in the statement read into the record of Mr. Bushnell?

A. I believe so. At the time I recall that the data that was presented, insofar as the fallout patterns were concerned, were quite convincing that the radioactive – the levels of exposure were quite likely not to have been sufficiently high to have caused these problems in the sheep. Nonetheless, I had the gnawing doubt that I still have, that there is no satisfactory explanation for the diseases and the symptoms manifest, and that the symptoms were compatible with radioactive fallout.

39. Mr. Finn, one of defendant's attorneys hand delivered a copy of the unpublished confidential letter from Veenstra, and in general must have been aware of Dr. Trum's maneuverings to achieve unanimity among the expert witnesses at the trial, or their disqualification. Finn knew from that time on that Veenstra's views were being pressured and distorted. Mr. Finn, Mr. King and Mr. Thomas were on reasonable notice that Dr. Thompsett had been subjected to intense pressure from Dr. Trum to change his position, and that any change was the result of that pressure rather than any real alteration of his convictions.

40. Defendant's representatives, including some of its attorneys and Dr. Trum, were familiar with Bustad's research including his fetal lamb studies.[10] It is clear that the significant support thus provided for plaintiffs' case on the issue of causation could not have been lost upon either Dr. Trum or the government attorneys knowing about this report. It is also clear that at the trial those attorneys, as well as Dr. Trum and other witnesses for the Government, must have realized how important knowledge of those "applicable" studies might have been in support of plaintiffs' case as they observed the unsuccessful efforts of plaintiffs' counsel to argue the "inapplicability" of the other Bustad studies made available for the Court's consideration

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[10] THE COURT: Are you saying then that the relevancy of your experiments at Hanford with regard to fetal lambs was recognized and your data was reported . . . .

THE WITNESS (Dr. Bustad) : Yes . . . .

THE COURT: Would that include Dr. Trum and the Attorneys for the United States in the preparation – during the time of the preparation of the defense of this case?

THE WITNESS: As far as making it available to them?

THE COURT: Yes, did you discuss it?

THE WITNESS: Oh, yes.

THE COURT: The significance of or the relevance of your investigation with regard to fetal lambs.

THE WITNESS: I discussed all of our results, sir.

and the weight the Court attached to those other studies in ignorance of the fetal lamb studies which strongly supported a different view.

41. At the trial the contention was made by counsel for the plaintiffs that there had been a "cover-up" by the Atomic Energy Commission. The Court in language quoted in Part I indicated that there was no evidence of this and stated in effect that it was unthinkable that in this area vital to human as well as animal well-being any investigators would fail to give their best objective opinion if they knew or suspected the possibilty of damaging fallout. With the foregoing information known to Governmnet representatives present at the trial and with the knowledge that the distorting pressures and suppressions hereinafter referred to were unknown to the Court, the Government representatives permitted the Court to decide the case without any indication of the information in their possession which would have raised serious question concerning the Court's assumptions of their good faith.

42. The defendant's lawyers participating in the trial again stood silently by as the Court in its oral decision attached substantial weight to the assumed change of opinion of two out of the three experts initially favorable to the plaintiffs' contentions on causation. Nor did any of them prior to the initiation of the present proceedings say or do anything to dispel what must have been known to them as an inaccurate and misled assumption.

43. Other direct evidence of the involvement of defendant's attorneys as officers of the court in a program of suppression and diversion is limited and the fixing of overall responsibility upon any particular lawyer likely impossible. No doubt some acted in good faith, having only insignificant glimpses of the total pattern. Yet, it appears clearly and convincingly from all of the circumstances of the litigation

as they now appear, and I find, that one or more of defendant's attorneys knowingly participated in a program for the concealment from the Court of facts which he or they knew or in good conscience should have known the Court was entitled to have placed before it in order properly to rule upon the determinative issues of the case.

Limitations and Laches

44. Following the 1956 trial, plaintiffs took no action to investigate the charges of "cover-up" made against the Government, until about February 16, 1979, when they or their representatives participated in the Congressional hearings and investigations heretofore mentioned. Plaintiffs did not file their action and motions claiming fraud upon the court until February 1981.

45. Prior to January 1955 plaintiffs' counsel obtained a file from the Las Vegas Field Office of the AEC containing documents relating to the AEC investigation of plaintiffs' sheep deaths. The file contained the initial reports of Drs. Veenstra and Thompsett. Consequently, plaintiffs had actual knowledge, through documents produced by defendant that at least initially there were opinions expressed by Drs. Veenstra and Thompsett concluding that radiation had contributed to the sheep deaths and it may also be inferred that prior to the trial they knew of similar views initially entertained by Dr. Holmes.

46. Counsel for plaintiffs in considering the replies to interrogatories, some of which were unresponsive as earlier noted, accepted the answers of the Government and on their basis came to believe that Holmes Thompsett and Veenstra had, indeed, changed their positions from those theretofore supportive of plaintiffs' contentions on causation to opinions adverse to them. Counsel for plaintiffs did not either at the trial or by discovery fully test the reasons or details

of these changes apparently because of their apprehension that by so doing they would weaken or destroy their reliance upon earlier statements to support their prima facie case.[11]

III DISCUSSION

On this record I can find no broad ulterior conspiracy, no centralized planning in high places, no corruption in the ordinary sense of the term, no overt violaiton of law (although pressure upon witnesses to testify favorably to the Government or not to testify at all smacks of an endeavor to influence witnesses proscribed by 18 U.S.C. § 1503), no motive for personal gain, nor any other ultimate purpose than to advance the perceived interests of the United States in the unimpeded testing of nuclear weapons and to prevent this program from being needlessly interfered with or embarrassed by judicial action. But the improper means by which this purpose was sought to be achieved are in my opinion unacceptable as a part of the judicial process.

There are circumstances which render the case far from an easy one, not the least of which is the long interval of time

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[11] All counsel were on notice that the Court expected a full exploration of changes in the opinions of experts since it stated at a pretrial conference shortly before the trial:

> THE COURT: Furthermore, you gentlemen expressed the thought that you need [at the trial] some of this, these statements, because it might indicate some factors you couldn't establish from the witnesses themselves... I'm not too much impressed with the idea because I apprehend that when we get through with this case we will face all these reports. That is the way I feel about it, Mr. Thomas ... and we are going to come up with an end result not based technically about the first impression or even the last impression, but a balancing of them all.

Transcript of pretrial hearing Aug. 31, 1956, at 13, 14.

with which we have had to cope. There are resulting imponderables in addition to the unavailability of a complete trial record. There could be a temptation to treat present-day cynicism concerning the good faith of government officials as always having existed. Much has happened during the last decade or so to alter public opinion. Ideas of what conduct of investigators, witnesses and officers of the court is acceptable in the course of the judicial process may have changed, hopefully for the better, as we get further and further away from the idea of mere gamemanship in the operation of the adversary system.[12] The intervening years between the original trial and the present have no doubt brought new perceptions in the light of which it would be unfair to nicely evaluate conduct and attitudes in the 50's, or inappropriate to assume, as some courts have viewed new substantive concepts, that current ethical or moral standards for litigation have always existed. And it is quite true that judged by modern insights I took a somewhat pristine view at the original trial of the general integrity of government officials in the absence of evidence impugning it in specific instances. I suppose that I shall continue to do so, despite the buffetings of Watergate, these proceedings and other current disclosures. Nonetheless, I have concluded that by whatever standard or as of whatever period the circumstances found here are to be judged, they clearly and convincingly demonstrate a species of fraud upon the court for which a remedy must be granted even at this late date.

Fraud upon the court is a nebulous concept, *Wilkin* v. *Sunbeam Corporation,* 466 F.2d 714 (10th Cir. 1972). It of course need not fall neatly into a pattern of common law or securities fraud, nor be accomplished by any single means

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[12] *See, eg.,* Frankel, *The Search for Truth: An Umpereal View,* 123 U. Pa. L. Rev. 1033 (1975).

or in any particular way for, as in the instance of other similar concepts, precise definition should not supply to transgressors a convenient map for avoidance. But it is that species of fraud which does, or attempts to, defile the court itself or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its important task of adjudicating cases that are presented for adjudication. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). *See also* 7 Moore's Federal Practice (2d ed.) ¶60.33 at 515. Both Moore, *Id.* at 512 13, and *Wilkin*[13] at 717, suggest that *Hazel-Atlas* expanded the traditional fraud on court concept. The defendant has cited cases, including *Wilkin,* to emphasize the strong public policy supporting the finality of judgments and indicating that even perjury, false answers to interrogatories, or new evidence in and of themselves will not warrant their being set aside in ordinary circumstances. I do not regard any of them as persuasive against plaintiffs' contentions in the virtually unprecedented circumstances shown by the present record and believe that they must yield here to broad application of principles to be gathered from *Hazel-Atlas.*

The present is not an ordinary case with mere private or even ordinary public concerns. It originated amid a transcendent chapter of world history, developing but imperfect information concerning a mysterious and awesome device as to which the AEC and those associated with it enjoyed a virtual monopoly of knowledge in comparison to that independently available to the plaintiff sheep owners, their

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[13] In *Wilkin* the claims of fraud upon the court were rejected on the grounds that documents in question had been held by the district court to be irrelevant and immaterial to the issues and the lawyers statements complained of depended upon a credibility issue which the trial court resolved against the plaintiff.

attorneys and, indeed, the Court, and a variated and persistent program of government representatives to disclose only selectively the information fairly necessary in the prospective judicial proceedings.

In such a setting it appears by clear and convincing evidence, much of it documented, that representations made as the result of the conduct of government agents acting in the course of their employment were intentionally false or deceptive; that improper but successful attempts to pressure witnesses not to testify as to their real opinions, or to unduly discount their qualifications and opinions were applied; that a vital report was intentionally withheld and information in another report was presented in such a manner as to be deceitful, misleading, or only half true; that interrogatories were deceptively answered; that there was deliberate concealment of significant facts with reference to the possible effects of radiation upon the plaintiffs' sheep; and that by these convoluted actions and in related ways the processes of the court were manipulated to the improper and unacceptable advantage of the defendant at the trial.[14] Relief should be granted upon these findings unless for some reason it is barred by the doctrine of laches.

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[14] *Cf. Rozier* v. *Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978) in which the court said:

> Through its misconduct in this case Ford completely sabotaged the federal trial machinery, precluding the "fair contest" which the Federal Rules of Civil Procedure are intended to assure. Instead of serving as a vehicle for ascertainment of the truth, the trial in this case accomplished little more than the adjudication of the hypothetical fact situation imposed by Ford's selective disclosure of information. The policy protecting the finality of judgments is not so broad as to require protection of judgments obtained in this manner.

The question of laches is not to be lightly dismissed, although obviously in this court of equity the defense of the statute of limitations is without merit. It is contended that plaintiffs were at fault in not delving more deeply or quickly into the matters of which they now complain.

Though it might be thought that even before the time of the Congressional hearings plaintiffs may have had notice of questionable circumstances sufficient to have placed a reasonable person on inquiry under the ordinary standards governing statutes of limitations for fraud actions generally, and granted, too, that a lack of diligence of private parties under some circumstances should weigh upon the judgment of a court in considering the granting of the extraordinary relief sought here (as it has), I have concluded that there has been no laches of a character to bar relief.

The defendant has emphasized in its other arguments the unusual nature and strong proof essential as prerequisites to any justified action for fraud upon the court; by the same token perhaps neither the Court nor the defendant should be unduly impatient because plaintiffs awaited the assembling of what could be thought to be weighty and convincing evidence before actually filing their charges. Nor does it lie with the Government to say that the plaintiffs, not to mention the Court, should have known better than to fall victim to the deceptions practiced or move more promptly in rectifying them. A court should not permit the very effectiveness of a party's improper tactics, nor even the lack of diligence of private parties, given a case of fraud on the court, to bar it from considering at any time the public interest and the imperative of safeguarding the judicial process and the court as an institution. As was stated in *Hazel-Atlas:*

> But even if Hazel did not exercise the highest degree of diligence, Hartford's fraud cannot be con-

> doned for that reason alone. This matter does not concern only private parties. There are issues of great moment to the public.... Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agents of public justice be not so important that they must always be mute and helpless victims of deception and fraud.

322 U.S. at 246, 64 S.Ct. at 1001.

The facts, circumstancse and inferences stated in the foregoing Part III Discussion and Part I Memorandum are intended where appropriate to constitute additional findings of fact in supplementation of Part II for the purpose of Fed.Civ. Rule 52 (a).

IV CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

1. That it has jurisdiction over the subject matters of these proceedings and over the parties, and particularly that as a court of equity and by reason of Fed.R.Civ.P. 60 (b) it has jurisdiction and authority to grant the relief sought by the plaintiffs.

2. That defendant perpetrated a fraud upon the court for the reasons hereinabove stated.

3. That neither plaintiffs' suit to vacate the judgments in question nor the relief hereby granted is barred by laches or any statute of limitations.

4. That the judgment in the Bulloch action tried in 1956 should be vacated.

5. That the tried action in effect involved all of the other above-entitled actions, that the same justification and imperative for the setting aside of the judgment in that case apply to each of the others and that the judgments in all of them should be similarly treated.

6. That plaintiffs are entitled to costs of the present proceedings.

7. That new trials should be had in all of these actions.

8. Plaintiffs are directed to serve upon defendant and submit to the Court within ten days from the date hereof a proposed form of judgment in harmony with the foregoing findings of fact and conclusions of law, as to which the Court will welcome defendant's suggestions or corrections without considering them in any way to be a waiver of contentions in these proceedings.

9. This case is set on August 24, 1982, at the hour of 11 o'clock a.m., for settlement of the form of judgment.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

No. C-19-55

CAROLINE N. BULLOCH, MCRAE BULLOCH and KERN BULLOCH, Executors of the Estate of David C. Bulloch, MCRAE N. BULLOCH and KERN BULLOCH,

PLAINTIFFS,

v.

UNITED STATES OF AMERICA,

DEFENDANT.

Decided Oct. 26, 1956

A. Sherman CHRISTENSEN, District Judge.

During the Spring of 1953, the United States Atomic Energy Commission conducted as "Operations Upshot Knothole" a series of nuclear tests at the Nevada Proving Ground, northwest of Las Vegas, Nevada. At the time of the first shot, plaintiffs' herd of sheep some fifty miles northeast of the test site was moving from the winter range in an easterly direction toward shearing and lambing grounds in the vicinity of Cedar City, Utah. During the trip, this herd was within, or near, areas of radioactive fallout resulting from some of these detonations. Following the first, and continuing more or less until after the last shot of the series, abnormal losses of sheep and lambs from the Bulloch herd were noted. Other herds in the same general vicinity suffered similar difficulties which are the subjects of companion suits.

Preliminary observations of the animals disclosed gross signs simulating the effects of beta radiation. There were other evidences which suggested damage from gamma rays. An extensive study was thereupon undertaken by cooperating governmental agencies concerning possible effects of radiation upon these animals. The conclusion reached by the investigating agencies, with dissents on the part of three of the veterinaries participating, was that certain lesions observed on the sheep and the losses and damages suffered by them were neither caused nor substantially contributed to by radiation. A denial of liability on the part of the Government resulted in this and similar suits.

Voluminous testimony and numerous exhibits have been received in evidence. It was thought that the nature of the issues commended the most liberal exploration of the facts consistent with the substantial rights of the parties. The case was presented with high ability and diligence by counsel, and an array of distinguished and informed witnesses appeared. The Government contends that the losses suffered by the Bullochs were the natural result of unprecedented cold weather during the lambing and shearing of sheep, inadequate feeding, unfavorable winter range conditions, and infectious diseases of various types, the combined effects of which were improperly thought by some during the preliminary investigation to comprise irradiation syndromes. The plaintiffs contend that the coincidence of damage and location of the sheep in fallout areas, not only as regards the Bulloch herd but as to sheep similarly located and similarly affected, the inability of preliminary investigators to definitely rule out irradiation or to identify any other cause, the views of the three veterinaries which initially supported plaintiffs' theory in one respect or another, the measured radioactivity in samples from some of the sheep, the failure of subsequent experiments to take into account the peculiar conditions under which the sheep in

question were operated, together with other claimed indications of a relationship, all established by preponderate evidence that plaintiffs' abnormal losses were proximately caused, or substantially contributed to, by radiation.

On the law phases of the case, plaintiffs assert that the damage was caused through the negligence of employees of the Government, acting within the scope of their authority and not in the exercise of any discretionary function; and that thus the Government is liable by virtue of the provisions of the Federal Tort Claims Act of August 2, 1946, Title 4, Public Law 601, 79th Congress, as amended, 28 U.S.C.A. §§ 1346, 2671 et seq. The Government contends that there was no negligence of any employee of the Government proximately causing damage to the Bulloch sheep, and that if there were any damages suffered as a result of governmental action, there could be no recovery in any event as they would be in consequence of the exercise of a discretionary function of Government. 28 U.S. C.A. § 2680 (a).

I find no reason to depart from, or to repeat, my discussion of the law of the case as determined on the Government's motion to dismiss, Bulloch v. United States of America, D.C., 133 F. Supp. 885. Authoritative decisions since have confirmed the view that because negligent acts or omissions of governmental employees arise in the course of an activity the institution and policy of which are matters for governmental discretion, does not mean that on the operational level there cannot be liability on the part of the Government. Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. —; United States v. Union Trust Co., 350 U.S. 907, 76 S.Ct. 192, 100 L.E. —, decision below, Eastern Air Lines v. Union Trust Co., 95 U.S.App. D.C. 189, 221 F.2d 62.

That the Government may be liable for the negligence of its agents in failing to warn herders in an area of anticipated fallout of planned detonations known to involve substantial danger to them or their property, I entertain no doubt. Not unmindful of the vital importance of nuclear experimentation to the welfare and safety of our country, there yet has been established nothing here that would justify the intentional or negligent endangering of lives or property in the course of the tests. To seek to do so would seem to compromise fundamental human rights for the protection of which our governmental policy is designed. Indeed, while reluctant to broadly concede the point, it was not disputed by counsel for the Government that its responsibility was to so conduct the tests as not to intentionally, wantonly or negligently endanger human lives or private property. Certainly, there was no evidence from which it might be inferred that to do so was within the discretion vested in any officer or agent of the United States.

It seems so manifest as hardly to be subject to suggestion to the contrary that those charged with security provisions in connection with the tests owed to those who might be substantially damaged by resulting radioactive fallout, the duty to use reasonable care to ascertain their whereabouts within areas to be affected and to at least give them timely warning so that they would be in a position to protect themselves and their property, if necessary. There were no advance warnings given or other precautions taken to safeguard the herders or their sheep. There was no suggestion in the evidence of any unexpected devlopments. Any variables with reference to direction or velocity of winds aloft would seem immaterial since the agents of the Atomic Energy Commission did not attempt to ascertain the location of the sheep with or without reference to any prospective pattern of fallout dependent upon winds. Damage, if any, which did occur from the blasts could well have been

anticipated by those in charge of the tests for aught the evidence discloses.

The case turns upon whether damage did in fact occur to the Bulloch sheep as a result of atomic radiation. Looking first at the evidence indicating that the damage to the sheep was the result of radioactivity, it is true that coincidence of the period of the tests and the time of abnormal losses was persuasive at first blush. The original descriptions of the lesions and the appearance of the sheep indicated especially to the sheepmen, but also to some of the experts, that there was a possibility of some relationship. However, in considering this element, it must be recognized that radioactivity was in the air at the time, figuratively, if not actaully. There must have been in the shepmen's minds some concern about atomic radiation, with its mysterious and somewhat awesome implications. When an effort was made to reconstruct the development of the damage for the benefit of subsequent investigators — and I am convinced it was a good-faith effort on the part of the sheepmen — it was unavoidable that their views were unconsciously affected by this background.

Of the three professional men who originally suggested radiation damage, two, upon further consideration, questioned their original diagnosis. None of them claimed to be particularly qualified in the field of radiation. On the other hand, some of the best informed experts in the country expressed considered and convincing judgment that radiation damage could not possibly have been a cause or a contributing cause. One witness upon whom the plaintiffs most strongly relied, did examine the sheep prior to the arrival of other experts, but he really had no better opportunity for observation than they. At the time of his examination, there were few sick animals. Most of the animals which had theretofore died had been hauled away. On the sheep that were examined by him, most of the

lesions were facial and on the eartips, and these types of lesions continued until after most of the experts doing field work had the benefit of their observation.

Plaintiffs argue that there were differences in the sheep involved in controlled experiments and the Bulloch sheep, and that by reason of these differences a finding that radioactivity was the cause of plaintiffs' damage would be possible. But the experts effectively maintained their opinions to the contrary for the most part with these differences in mind. It does not lie with the Court to question the great weight of the testimony that these differences were not determinative, in the absence of at least some evidence that they were. Moreover, if I could entertain a contrary view on this phase of the evidence, I would be confronted with the positive testimony from those best in a position to know that the maximum amount of radioactive fallout in any area in which the sheep could have been, would have caused no damage. We would be confronted, too, with the established fact that camp horses, camp dogs, and the herders themselves, who would have been exposed to the same fallout as the sheep, exeprienced no effects whatsoever. There was also testimony, despite plaintiffs' theory that the March twenty-fourth shot involved maximum danger to the sheep, that in the areas where they then were there was no radioactivity above background.

The great weight of the evidence indicates, and I find, that the maximum radioactive doses to which the Bulloch sheep could have been subjected, whether as a result of direct fallout, residuals therefrom, ingestion of plants or water, or through other means, was substantially less than would have caused damage; that the expected and actual fallout in the areas in which the sheep were, or in which they could reasonably have been expected to be, was well within th permissible maximums for human or animal body tolerance; that there was no contamination of air,

water or earth not consistent with benign conditions in the areas where the Bulloch sheep were located; that the signs and symptoms detected upon an examination of the sheep were not effects of radiation; and that since there was no substantial danger of damage to the sheep in question, and none occurred as a result of the Upshot-Knothole series, no negligence on the part of the Government has been established within the issues of the case. I conclude that plaintiffs are not entitled to recover herein.

Now, with reference to costs: This is an action which needed trying. There were various misconceptions that could have been cleared up only through a trial such as this. The result here, I understand, will dispose of a number of companion cases. As a result of related investigations, additional information concerning the effects of radioactive fallout has been made available. In view of all the circumstancse, I do not think that it would be right to saddle upon these particular plaintiffs the considerable court costs incurred by the Government.

Counsel having indicated no objection as to form, the foregoing may be deemed the findings of fact and conclusions of law of the Court. Accordingly, the clerk is directed to enter judgment that the plaintiffs take nothing and that this action be dismissed on the merits, without the allowance of costs.

Supreme Court, U.S.
FILED
NOV 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-472

In the Supreme Court of the United States

OCTOBER TERM, 1985

DAVID BULLOCH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners failed to produce evidence substantiating their contention that the government committed fraud upon the court in suits litigated in 1956 under the Federal Tort Claims Act.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1a-25a) is reported at 763 F.2d 1115. The opinion of the panel of the court of appeals (Pet. App. 27a-39a) is reported at 721 F.2d 713. The opinion of the district court (Pet. App. 42a-91a) is reported at 95 F.R.D. 123. The opinion of the district court in the underlying Federal Tort Claims Act proceeding (Pet. App. 92a-98a) is reported at 145 F. Supp. 824.

JURISDICTION

The judgment of the en banc court of appeals was entered on May 22, 1985. On August 12, 1985, Justice White extended the time within which to file a petition for a writ of certiorari to and including September 19, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1955, petitioners filed suits against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, in the United States District Court for the District of Utah, alleging that their sheep had been killed by ionizing radiation from one or more of the open-air atomic weapons tests conducted in Nevada two years earlier. One of those suits, designated as *Bulloch I*, was chosen as the lead case and proceeded to trial. On October 26, 1956, judgment was entered in favor of the government in *Bulloch I*. No appeal was taken from that judgment, and petitioners consented to dismissal of their remaining suits.

The decision in favor of the government in *Bulloch I* was based on the "great weight of the evidence indicat[ing]" that the deaths of petitioners' sheep had not been caused by radiation (Pet. App. 97a). At "first blush," the "coincidence of the period of the tests and the time of abnormal losses," as well as the fact that the sheep had developed lesions resembling radiation burns, convinced "some of the experts * * * that there was a possibility of some relationship" (*id.* at 96a). However, "[a]n extensive study" demonstrated that the lesions observed on the sheep "were neither caused nor substantially contributed to

by radiation" (*id.* at 93a). In addition, "the positive testimony from those best in a position to know" was that "the maximum amount of radioactive fallout in any area in which the sheep could have been * * * would have caused no damage" (*id.* at 97a). Of the three veterinarians "who originally suggested radiation damage, two, upon further consideration, questioned their original diagnosis" (*id.* at 96a); moreover, "[n]one of them claimed to be particularly qualified in the field of radiation" (*ibid.*). "On the other hand, some of the best informed experts in the country expressed considered and convincing judgment that radiation damage could not possibly have been a cause or contributing cause" of the deaths of petitioners' sheep (*ibid.*).[1]

2. Petitioners filed the instant case, *Bulloch II*, in 1981 as an independent action in equity to set aside the judgment in *Bulloch I* for alleged fraud upon the court.[2] Petitioners asserted that in *Bulloch I* the government, with the knowledge or participation of its attorneys, "deliberately covered up and concealed the truth concerning the extent and effects

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[1] The government contended that the deaths of petitioners' sheep were "the natural result of unprecedented cold weather * * *, inadequate feeding, unfavorable winter range conditions, and infectious diseases" (Pet. App. 93a).

[2] Simultaneously, petitioners filed motions in the original dockets of *Bulloch I* and the related suits to set aside the judgments under Fed. R. Civ. P. 60(b). See Pet. App. 43a-44a. "[A]t the outset," the district court avoided "[d]uplication of effort [and] procedural problems" by "consolidation of all of the actions" (*id.* at 44a). Ultimately, however, the district court chose petitioners' independent action as the appropriate vehicle for resolving their claims. See *id.* at 2a; Gov't C.A. App. 69.

of radiation upon [petitioners'] sheep" (Pet. App. 52a) by suppressing experimental evidence, pressuring potential witnesses, withholding and falsifying documents and data, and giving misleading answers to interrogatories.

Bulloch II was heard by the same district judge who had decided *Bulloch I*. Following trial, the district court held that the government had committed "a species of fraud upon the court" in *Bulloch I* (Pet. App. 86a). The district court's conclusion was based on four categories of events: first, that government reports indicating that petitioners' sheep had been exposed only to small amounts of radiation were misleading (*id.* at 58a-60a); second, that data derived from government-sponsored experiments that involved feeding radioactive iodine to sheep had been suppressed (*id.* at 60a-65a); third, that two veterinarians who had examined petitioners' sheep had been pressured not to give testimony favorable to petitioners (*id.* at 65a-75a); and fourth, that the government's answers to two interrogatories in *Bulloch I* had deceived petitioners into believing that all of the experts who had initially suspected that radiation was a possible cause of the deaths of the sheep eventually changed their minds (*id.* at 75a-78a). In addition, the court indicated that the government's attorneys in *Bulloch I* had "knowledge [of] the[se] distorting pressures and suppressions" but failed to "say or do anything to dispel" them (*id.* at 83a).[3]

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[3] The district court specifically concluded (Pet. App. 85a) that it could

> find no broad ulterior conspiracy, no centralized planning in high places, no corruption in the ordinary sense of the term, no overt violation of law * * *, no motive for per-

The district court stated that it would be "inappropriate" to express an opinion whether retrial of *Bulloch I* would result in a judgment favorable to petitioners (Pet. App. 81a; see also *id.* at 64a).[4] However, it found that "at the time of the original trial[,] it could not have been fairly represented to the Court that injury to at least some substantial number of plaintiffs' sheep could not have been caused by radiation" (*id.* at 81a; see also *id.* at 57a-58a).[5] Concluding that "determinative evidence which should [have] been placed before the Court at the original trial was not made available to it" (*id.* at 81a), the court ordered that the judgment in *Bulloch I* be set aside and petitioners' FTCA suits be retried. Finally, although not "lightly dismiss[ing]" (*id.* at 89a) the government's contention that petitioners' claims in this case were barred by laches, the court held that the requested relief was not foreclosed (*id.* at 84a-85a, 89a-90a).

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sonal gain, nor any other ultimate purpose than to advance the perceived interests of the United States in the unimpeded testing of nuclear weapons and to prevent this program from being needlessly interfered with or embarrassed by judicial action.

[4] Contrary to petitioners' characterization, the district court did not find that the alleged government conduct "had a material effect on the outcome of the first trial" (Pet. 6) or that "the outcome of the case might have been different" (Pet. 8). The district court explicitly declined to consider the potential effect of petitioners' claims on the underlying tort actions.

[5] The district court noted that two "[r]ecent reassessments" of the scientific data "tend[] to support" the position taken by the government in *Bulloch I*, but that one study has concluded that a causal connection existed between radioactive fallout and the deaths of petitioners' sheep (Pet. App. 79a-80a).

3. a. The court of appeals reversed in a unanimous panel opinion (Pet. App. 27a-39a) that was subsequently adopted verbatim by the en banc court (*id.* at 1a-13a). Reviewing each of the district court's findings "in relation to the record in the proceedings appealed from and to what original record and briefs are extant" from *Bulloch I* (*id.* at 8a),[6] the court of appeals held that "none of the[] several findings or conclusions" upon which the district court based its decision "are supported by the record" (*ibid.*).

As the court of appeals explained (Pet. App. 5a), "the most significant aspect of the records in Bulloch I and II is that all the information, data and witnesses were available to plaintiffs at Bulloch I." Thus, "the record shows that at Bulloch I the Government provided all data plaintiffs asked for," gave them its "file data on the investigation of the sheep deaths," and "offer[ed] to make available individuals who had participated in the study and any others" who might have relevant information (*id.* at 5a). In particular, the *Bulloch I* record demonstrates that petitioners "had available and used the same basic data used by the Government to make its estimates" of the amount of radiation to which the sheep had been exposed, and "shows that all the information

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[6] All of the extant *Bulloch I* record was made a part of the record in this case; although only a limited portion of that once "voluminous" (Pet. App. 93a) original record was still in existence at the time *Bulloch II* was filed, "[f]rom the depositions, briefs and memoranda and with the trial court's [oral and written] summary," the court of appeals concluded that "the trial as to the specific points relied on by the trial court in Bulloch II can be reconstructed with some confidence" (*id.* at 2a).

the Government had as to dosages was available" to petitioners (*id.* at 3a). Similarly, with regard to the experimental studies that petitioners allege the government concealed, "[a]ll the * * * data w[ere] published and w[ere] available to the public in 1953" and indeed were "cited * * * with clear references-citations to the details" by the very report in which petitioners claim that the experimental findings were misrepresented (*id.* at 7a). Furthermore, the district court in *Bulloch II* "did not follow the testimony of the experts" (*ibid.*), who testified that there was "no significant similarity" between petitioners' sheep and the experimental animals that had been fed radioactive material (*id.* at 6a). And since petitioners "were familiar with all the background data" and "chose not to seek additional answers or clarifications," there is "nothing to demonstrate" that the government's answers to interrogatories in *Bulloch I* were misleading (*id.* at 7a).

In addition, the court of appeals noted that all of the people "who were supposed to have participated in the suppression of evidence" that allegedly occurred in *Bulloch I*, and who still were alive to testify in *Bulloch II*, "testified specifically that there had been no suppression whatever of evidence at Bulloch I * * * [and] that there had been no attempt to pressure them as to their opinions or as to their testimony" (Pet. App. 4a). Moreover, petitioners were fully aware of the positions of the various experts in *Bulloch I* who had investigated the deaths of the sheep, and "nothing whatever * * * could have misled" petitioners as to those views (*id.* at 5a). The record in *Bulloch I* reveals that petitioners "had the data the Government had" regarding the conclusions

of the experts (*ibid.*), and the veterinarians who petitioners allege were pressured to conceal their true opinions in fact were available to and presented evidence for petitioners in *Bulloch I* (*id.* at 6a).

Based on its thorough review of the record, the court of appeals concluded that there is "no evidence whatever of fraud" (Pet. App. 9a). Petitioners "have come forward with nothing of any consequence which was not available to them at Bulloch I" (*id.* at 11a), where "[t]hey made their choice as to what to do and what to use" (*ibid.*). Petitioners, the court observed, "have set forth extravagant statements in their briefs," but the record "falls far short of proof of fraud on the court or any other kind of fraud" (*id.* at 13a). Accordingly, the court of appeals concluded that the district court "was so in error" that "its conclusion and judgment constituted an abuse of discretion" (*ibid.*).

b. Two judges dissented from the decision of the en banc court of appeals (Pet. App. 14a-25a). Noting the "historical reticence of appellate courts to overturn the grant of a new trial" (*id.* at 14a), the dissenters argued that the district court's judgment should be reversed only if it is "so clearly erroneous as to constitute a manifest abuse of discretion" (*id.* at 24a). Because they believed that the evidence "regarding whether the government intentionally tried to mislead the plaintiffs and the district court was contradictory" (*ibid.*), and because of "the trial court's better perspective * * * and the constraints inherent in the abuse-of-discretion appellate standard" (*id.* at 25a), the dissenters would have affirmed the judgment of the district court.

ARGUMENT

The decision of the court of appeals is correct and turns entirely on the factual record in this case. Accordingly, further review is not warranted.

1. At bottom, this is simply a case where petitioners' "extravagant" allegations "have not been borne out by the record" (Pet. App. 13a). As the court of appeals' opinion makes clear, the decision below is wholly fact-bound in nature. The court of appeals held, based on its considered review of the record, that "nothing whatever * * * could have misled [petitioners in *Bulloch I*]" (Pet. App. 5a), that "none" of the district court's essential findings and conclusions "are supported by the record" (*id.* at 8a), and that "there was no evidence whatever of fraud developed in the court hearings" (*id.* at 9a). Thus, the court of appeals' decision is squarely grounded in the conclusion that the evidence in the record "falls far-short of proof of fraud on the court or any other kind of fraud" (*id.* at 13a) and that the district court's ruling "was so in error" that it "constituted an abuse of discretion" (*ibid.*).

2. Petitioners argue (Pet. 13-14) that the court of appeals misapplied the "clearly erroneous" standard of review under Fed. R. Civ. P. 52(a). As petitioners acknowledge (Pet. 13), however, the issue they raise of "the proper application of Rule 52" does not warrant this Court's review.

In any event, the decision of the court of appeals is correct. The court was surely aware of the well-settled principles governing appellate review, and the standard urged by petitioners (Pet. 14) was cited both in their brief before the en banc court (Appellees' Supplemental Brief to the Court In Banc 38) and in the dissenting opinion below (Pet. App.

15a-16a, 24a). Moreover, the government candidly conceded that it had "the burden of demonstrating that the *Bulloch II* district court's findings are clearly erroneous" (Appellant's Response to the Appellees' Supplemental Brief 20). The court of appeals' opinion indicates that it found that this burden was met (see, *e.g.*, Pet. App. 5a, 9a, 13a) and that the district court's determinations were fundamentally "in error" (*id.* at 13a).

Contrary to petitioners' allegation that evidence was suppressed or withheld from them in *Bulloch I*, "the most significant aspect of the records in Bulloch I and II is that all the information, data and witnesses were available to [petitioners] at Bulloch I" (Pet. App. 5a). In fact, even before petitioners filed their Federal Tort Claims Act suits, they were given the government's files relating to its investigation of the deaths of their sheep (see Gov't C.A. App. 460). Furthermore, during the course of the FTCA litigation, petitioners did not have to file any motions to compel discovery because the government voluntarily provided access to any information, materials, or personnel that they sought (see, *e.g.*, Gov't C.A. App. 442-443, 448-457). As the court of appeals noted (Pet. App. 6a), petitioners' own "Bulloch I trial memorandum,[7] and the depositions [8] show that they had the documents and the information."

Petitioners nonetheless assert (Pet. 14) that it is "beside the point" that all of the evidence was available to them because the "government's misconduct undercut [their] ability" to develop and make use of

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[7] See Gov't C.A. App. 467-489.

[8] See, *e.g.*, Gov't C.A. App. 518-558 (deposition of Dr. Holmes).

the evidence. The record of what actually happened in *Bulloch I* is irreconcilable with petitioners' assertion. For example, petitioners argue (Pet. 5-6) that the government exerted improper pressure to "neutraliz[e]" Dr. Robert Veenstra, an Army veterinarian who participated in the government's investigation of the deaths of petitioners' sheep. However, the record plainly shows that, far from being "neutralized," Dr. Veenstra testified in *Bulloch I* that he "definitely * * * [and] positively" believed that radiation had caused the deaths of petitioners' sheep. See Gov't C.A. App. 576; see also Pet. App. 68a-69a, 70a. Furthermore, Dr. Veenstra testified categorically in the instant proceeding that he had not been pressured in *Bulloch I* to alter his opinions or to refrain from expressing them. See Gov't C.A. App. 207-213, 233; see also Pet. App. 4a. Petitioners also argue (Pet. 6 n.4) that Dr. Robert Thompsett, another veterinarian who had participated in the government's investigation, had been subject to "undue pressure * * * to change his opinion" and had "falsely renounced his views." However, Dr. Thompsett, who died before the instant proceeding was commenced, testified unequivocally and without challenge in his deposition in *Bulloch I* that he changed his opinion because "[s]ubsequent findings have proof, in my mind, that there was not enough radioactivity * * * to have caused the damages" (Gov't C.A. App. 512). And, as petitioners' trial counsel explained to the district court in *Bulloch I*, he had met with Dr. Thompsett prior to the deposition and "[a]fter talking with him—this was a risk [not to question Dr. Thompsett] I took on my own—I concluded that he had changed his mind completely, and was hostile" (Gov't C.A. App. 596).

Nor is there merit to petitioners' argument (Pet. 6-7) that the government's *Bulloch I* interrogatory answers were misleading because they did not identify "at least two investigators" who believed that radiation may have caused the deaths of petitioners' sheep. The undisputed record establishes that petitioners were given copies of the reports of *all* of the investigators (see Gov't C.A. App. 467-489), and that petitioners in fact offered testimony in *Bulloch I* from *all* of the investigators who at any time suspected that radiation had caused the deaths of petitioners' sheep (see Gov't C.A. App. 570, 575-577).[9]

Finally, petitioners' argument (Pet. 7 n.5) that the government "deliberately concealed" experimental studies whose "findings supported petitioners' claim" is unfounded. As the court of appeals correctly pointed out (Pet. App. 6a-7a), all of the experimental data had been published (see, *e.g.*, Gov't C.A. App. 164-175) and were "clear[ly]" cited in the report (*id.* at 300-344) that petitioners argue misrep-

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[9] The district court concluded that the government's interrogatory answers were "evasive" (Pet. App. 76a). However, the government's answers were explicitly limited to the views of experts at the time the answers were propounded (*ibid.*), and petitioners were aware that at least three of those people had previously held a different opinion (see *id.* at 77a). Any objection that petitioners had to the government's answers should have been raised by appropriate motion at that point. The doctrine of fraud upon the court cannot be used to excuse the failure of a party to take reasonable steps to protect its interests in trial litigation. See *USM Corp.* v. *SPS Technologies, Inc.*, 694 F.2d 505, 509 (7th Cir. 1982), cert. denied, 462 U.S. 1107 (1983). In any event, counsel for petitioners acknowledged in *Bulloch II* that the possibility of unresponsiveness in the government's answers "was not that serious to me" (Gov't C.A. App. 147).

resented the data. Thus, petitioners' complaint regarding experimental data stems not from any withholding of information, but rather from their disagreement with the experts' conclusion that the experimental studies demonstrated that "the Utah sheep and lambs had not died from radioactive exposure." Pet. App. 7a; see Gov't C.A. App. 86-87, 120-122, 301, 342-343.

3. Petitioners argue (Pet. 9-13) that the court of appeals' decision is premised on an erroneous legal definition of fraud upon the court. As discussed above, however, the court's holding rests on the fact-bound conclusions that "there was no evidence whatever of fraud" (Pet. App. 9a) and that "nothing was demonstrated which would constitute fraud on the court" or "any other kind of fraud" (*id.* at 13a). Accordingly, "nice distinctions" about what constitutes fraud upon the court were immaterial to the disposition of this case, since "proof of the ultimate fact, to wit, that the decree was obtained by fraud, fail[ed]." *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 421 (1923).

As the district court noted, "[f]raud upon the court is a nebulous concept." Pet. App. 86a (citing *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714 (10th Cir. 1972), cert. denied, 409 U.S. 1126 (1973)). Relying on this Court's decisions in such cases as *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575 (1946), and *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U.S. 238 (1944), the court of appeals stated (Pet. App. 12a) that "[f]raud on the court * * * is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury. * * * It is * * * fraud * * * where the impartial

functions of the court have been directly corrupted." This brief, general statement does not purport to be a precise legal definition, which would have been unnecessary to the outcome here in light of the court's determination that there was no evidence of fraud of any kind (Pet. App. 13a). Instead, it simply reflects the well-settled principle that fraud upon the court is to be distinguished from "mere 'fraud.'" 11 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2870, at 253 (1973); see also *id.* at 255 (fraud upon the court consists of " 'the most egregious conduct involving a corruption of the judicial process itself' " (citation omitted)).

In sum, the court of appeals' decision turns on petitioners' failure to substantiate their factual allegations rather than on any particular definition of fraud upon the court, and it neither embraced nor relied on any rule of law that warrants this Court's review.[10]

4. Finally, there is no merit to the argument (Pet. 11-12) that the court of appeals erroneously based its decision on petitioners' lack of due diligence in not pursuing their claim between 1956 and 1981. The court did note that petitioners "have produced nothing to explain why they waited for 25 years to file this action" (Pet. App. 11a), but it then empha-

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[10] Contrary to petitioners' suggestion (Pet. 10), the court of appeals did not hold that an attorney's "efforts to deceive the courts" do not amount to fraud upon the court. Rather, what the court held was that "the assertions of fraud against the Government, the witnesses, the Government employees, the experts *and the attorneys* for the Government were all fully tried and considered," that "there was no evidence whatever of fraud," and that petitioners "were unable to make a case *against anyone concerned*" (Pet. App. 9a (emphasis added)).

sized that "*of more importance* they have come forward with nothing of any consequence which was not available to them at Bulloch I" (*ibid.* (emphasis added)). Thus, at most, the court's observation on petitioners' delay was subsidiary to its central conclusion, previously demonstrated in the opinion, that no proof existed of any fraud by the government.

Moreover, the court of appeals did not suggest that delay—either in this particular case or in general—constituted a bar to relief for fraud upon the court.[11] At the same time, however, to allow judgments to be set aside upon grounds of fraud, and long-closed cases to be reopened and retried, is an exception to the strong societal interest in finality of litigation. See, *e.g.*, *Hazel-Atlas Glass Co.*, 322 U.S. at 244. As the court of appeals correctly recognized (Pet. App. 12a), "unexplained delays bear on the concept of the finality of judgments and the proof [required of the challenging party]." Petitioners suggest no reason why it would be inappropriate for the "rule of equity" (*Hazel-Atlas Glass Co.*, 322 U.S. at 244) allowing judgments to be invalidated for fraud to take account of any unexcused and unreasonable dilatoriness in seeking judicial redress.

Here, even before judgment was entered in *Bulloch I* in 1956, petitioners "were asserting that there had been some sort of a 'cover-up' " (Pet. App. 11a). Nevertheless, they did not pursue the instant action for a quarter of a century. And even now they have failed to identify any evidence that was not available to them at the time. In *Bulloch I*, petitioners "made their choice as to what to do and what to use" (*id.*

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[11] Indeed, the court of appeals expressly ruled that the doctrine of laches is inapplicable to proceedings involving fraud upon the court (Pet. App. 12a).

at 11a). There is no basis to give petitioners "another chance" to try their tort claims simply because their original "trial strategy" proved to be unsuccessful (*id.* at 5a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20045

Supreme Court, U.S.
FILED
DEC 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DAVID BULLOCH, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The Court need go no further than the question presented in the government's brief (Br. in Opp. i) to discern how important the standards for judging a Rule 60(b) motion are for resolving the outcome of this case. The government poses the question presented as whether "petitioners failed to produce evidence substantiating their contention that the government committed fraud upon the court." But the answer to that question depends completely upon the legal test used to make that determination. If the court of appeals correctly required petitioners to prove that the government's tampering with witnesses "corrupted the court," then the government is surely correct that we failed to satisfy our burden of proof. If, however, petitioners were required only to demonstrate that a deception was practiced by government employees with the knowledge and tacit approval

of attorneys for the government, and that this conduct was likely to have affected the outcome of the case, then the district court correctly granted petitioners a new trial. Accordingly, the outcome of this case depends upon the court of appeals' interpretation of Fed. R. Civ. P. 60(b).

1. The government does not dispute petitioners' claim (Pet. 10-11) that the legal standard announced by the Tenth Circuit *en banc* conflicts with this Court's decision in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238 (1944), and with the decisions of every other court of appeals that has considered this issue. See cases cited Pet. 10-11. Instead, the government treats the court's legal analysis as though it were merely a sport; the "statement does not purport to be a precise legal definition." (Br. in Opp. 14). This characterization, however, ignores the context in which the statement was made. Petitioners sought rehearing *en banc*, in part, to correct the manifest error in the panel's interpretation of Rule 60(b). (Supplemental Br. on Rehearing 35-39). Judge McKay, in his dissent, took the majority to task for adopting an inappropriate legal standard for Rule 60(b). If the legal analysis employed by the court was irrelevant to its disposition of this case or was not intended to be taken seriously, it is incredible in the face of those challenges that the court of appeals would not have said so.

The reason no such statement appears is plain: a careful reading of the pivotal passages of the majority opinion reveals that the legal standard for Rule 60(b) was in fact crucial to the court of appeals' reversal of the district court's decision to grant a new trial. Contrary to the government's claim, the court of appeals did not ultimately hold that there was no evidence of fraud at all. Instead, the majority disposed of the "showing made by plaintiffs" regarding the suppression of documentary evidence prior to the 1956 trial as falling "short of proof of fraud on the court *or any other kind of fraud.*" (Pet.

App. 13a; emphasis added). The government, of course, relies upon this passage. But, in the next paragraph of its opinion, the majority turned to the crucial basis for the district court's holding that there had been a fraud on the court, *viz.*, the government's successful effort to influence the veterinarians' testimony regarding causation. On that issue, the majority did not (and properly could not) conclude that there was no evidence of fraud. Instead, the court held that "*nothing was demonstrated which would constitute fraud on the court.*" Pet. App. 13a. That conclusion, however, necessarily depended upon the Tenth Circuit's unduly restrictive interpretation of fraud on the court within the meaning of Rule 60(b). The government's opposition completely ignores this part of the Tenth Circuit's opinion.

It is therefore inappropriate for the Court to disregard the court of appeals' legal reasoning concerning Rule 60(b). An important Federal Rule of Civil Procedure, which exists both to protect the integrity of the judicial process and to regulate the ethical conduct of officers of the courts (see Pet. 12), has been emasculated by the court of appeals. Absent bribery or similarly corrupting conduct by a litigant, the Tenth Circuit does not recognize fraud on the court, and the government has implicitly conceded that this standard conflicts with the approach followed by all other courts. Because the Tenth Circuit was sitting *en banc*, that conflict can now be resolved only by this Court, and accordingly, the petition for certiorari should be granted.

2. Although petitioners submit that a fair reading of the opinion below clearly reveals the importance of the court's legal standard under Rule 60(b) to the outcome of this case, the government nevertheless seems to argue (Br. in Opp. 9-13) that the same result could have been reached without regard to any Rule 60(b) standards. The government's argument, like the court of appeals' analysis, however, accords no respect to the fact-finding function of the district court. See Fed. R. Civ. P. 52.

The government asserts that the court of appeals made a "thorough review of the record" in reaching *its* findings regarding fraud. The government ignores the opportunity the district court had to observe the witnesses and Judge Christensen's unique perspective in deciding this case, having presided over both the original trial and the Rule 60(b) motion. Moreover, regardless of whether or not the court of appeals "was surely aware of the well settled principles governing appellate review" (Br. in Opp. 9), it showed no fidelity to those principles. Compare *County of Los Angeles* v. *King*, No. 85-295 (Nov. 4, 1985) (per curiam). To take merely one example, it is simply impossible to examine the evidence surrounding Dr. Veenstra's testimony at the 1956 trial and conclude that no reasonable trier of fact could make a finding that the government acted improperly. The government's opposition is noteworthy for its complete unwillingness or inability to explain why Dr. Veenstra's letter of April 7, 1955, which completely supported petitioners' position on causation, would bear the statement at the top, most likely written by a Justice Department attorney: "This letter was not sent—has not been published and *is confidential to the Department.*" (Pet. App. 68a; emphasis added).[1]

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[1] Although the court of appeals (Pet. App. 3a, 5a) and the government (Br. in Opp. 6, 7) repeatedly assert that nothing was revealed at the Rule 60(b) hearing that was not available in 1956, that statement is at best misleading. The Veenstra letter, not surprisingly, was never delivered to petitioners in 1956. Thus, even though petitioners knew that Veenstra agreed with them on the issue of causation, they had no reason to suspect that Veenstra's weakened testimony at trial was the product of improper government influence.

There is no small irony in the government's decision to close its brief in opposition by faulting petitioners' counsel's "trial strategy" with respect to witnesses like Veenstra. That strategy was predicated on the assumption that the government was litigating in good faith. Counsel's only error was in believing that the government would strike hard blows but *not foul ones. Berger* v. *United States*, 295 U.S. 78, 88 (1935) (emphasis added). As the evidence reveals, that was a mistake.

Nor does the government attempt to explain the strange coincidence that on the very day that Veenstra's typed letter was delivered to a Justice Department attorney and just after government officials met with Veenstra, he suddenly, and without actually having seen any new experimental data, would draft a new letter "abdicating his long-time and forcefully defended position that radiation was a contributing cause" of the death of petitioners' sheep. (Pet. App. 70a).[2] While this evidence perhaps could be interpreted in different ways, it is surely sufficient to support the district court's finding, also supported by other evidence (see Pet. 6-8), that government officials, with the tacit approval of government attorneys, improperly withheld and "weaken[ed] evidence which the [District] Court should have been permitted to consider on its own merits in connection with other evidence in the case" (Pet. App. 75a).

3. With respect to the issue of petitioners' diligence in bringing the Rule 60(b) motion, the government argues (Br. in Opp. 14-15) that delay was not central to the court of appeals' disposition of the case and that, in any event, petitioners failed to suggest why delay should not be a relevant consideration.[3] First, if the government's reading is correct, it is difficult to understand why the court would repeatedly discuss petitioners' diligence. See

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[2] The government suggests (Br. in Opp. 11) that Veenstra's testimony at trial strongly supported petitioners' arguments. But the district court, which witnessed Veenstra's testimony, found it to be "most unimpressive" because, under government pressure, Veenstra "discounted his status as an expert . . ." (Pet. App. 71a).

[3] The government's characterization of the delay as "unexcused" and "unreasonable" (Br. in Opp. 15) is inconsistent with the findings of the district court that important documents were concealed by the government (Pet. App. 11a-13a), which the court of appeals did not and could not reject as clearly erroneous. For instance, no amount of diligence would have uncovered the Veenstra letters. Only the intervention of Congress in 1979-1980 succeeded in opening the government files containing those documents to petitioners.

Pet. App. 10a, 11a-12a (petitioners "have a heavy burden to demonstrate why they waited these many years. . ."). Indeed, the court's heavy reliance on due diligence undercuts the government's theory that the court decided the case solely on the basis of no evidence of fraud. Only if there were proof of fraud would the court have reason to consider lack of diligence as a basis for not reopening the case. But, in any event, this Court made clear in *Hazel-Atlas*, that the interest in judicial integrity was so strong that counsel's lack of diligence was completely irrelevant in deciding whether to grant a new trial. 322 U.S. at 246; Pet. 12. Accordingly, because the court of appeals clearly regarded counsel's "lack of diligence" as a relevant factor in denying petitioners a new trial, review by this Court is warranted in order to decide whether *Hazel-Atlas* is still a proper interpretation of Rule 60(b).

4. This "is not an ordinary case with mere private or even ordinary public concerns" (Pet. App. 87a); it is a case that raises a basic and recurring issue concerning the ethics of attorneys, and of particular significance, government attorneys, which arises out of an extraordinary time and set of events in this nation's history. The above-ground nuclear tests in Nevada in the 1950s have caused significant human concern, especially in Utah. The district court's thoughtful conclusion, that the trial in 1956 concerning the effects of radiation released by the government's nuclear tests was conducted unfairly, has raised legitimate doubts about the federal government's integrity in responding to the possible health and safety risks posed by those tests; doubts which the court of appeals' conclusory reversal cannot eliminate. The court of appeals' treatment of Rule 60(b), by itself, warrants this Court's review, but the circumstances surrounding the case make it imperative that the propriety of the government's conduct not be adjudged finally by any court other than this one.

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: December 4, 1985